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Supreme Court of the United States

OCTOBER TERM, 1944.

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No. 984

(D)

WESTERN ELECTRIC COMPANY, INCORPORATED,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT, AND BRIEF IN
SUPPORT THEREOF.**

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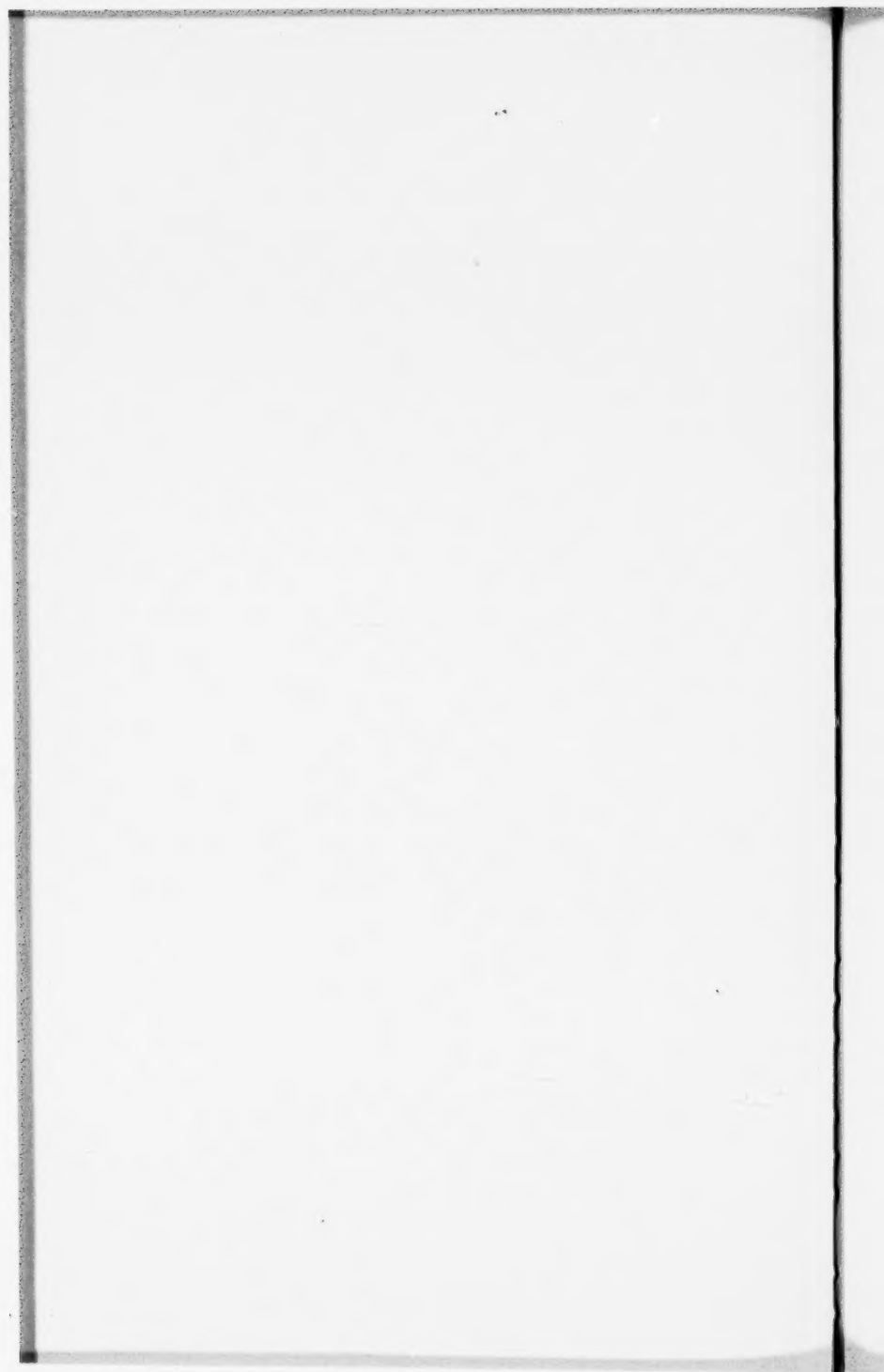
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February 26, 1945.

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No.

WESTERN ELECTRIC COMPANY, INCORPORATED,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

*To the Honorable, the Chief Justice of the United States,
and the Associate Justices of the Supreme Court of
the United States:*

Western Electric Company, Incorporated (hereinafter called the "Company"), prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fourth Circuit to review the decree of that Court (R. 347) entered in the above entitled cause on January 3, 1945, denying a petition to review and set aside, and enforcing, an order (R. 97-9) of the National Labor Relations Board (hereinafter called the "Board"), dated August 9, 1944, under Section 10 of the National Labor Relations Act, 49 Stat., 449 (hereinafter called the "Act"), directing the Company to disestablish Point Breeze Employees Association, Inc., the union representing its employees at its Point Breeze, Baltimore, Md. plant, and to cease interfering with

its employees at such plant in the exercise of the rights guaranteed by Section 7 of the Act.

A stay of mandate pending the determination of this application and any subsequent proceedings in this Court was issued by the Circuit Court of Appeals on January 27, 1945 (R. 348).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 10(e) of the Act and Section 240(a) of the Judicial Code as amended, 28 U. S. C., Section 347(a).

Summary Statement.

The matter involved is a decree by the Circuit Court of Appeals for the Fourth Circuit enforcing an order by the Board, which concluded that the Company had violated Section 8(2) of the Act by "dominating" Point Breeze Employees Association, Inc., the labor union which since 1937 has been the recognized bargaining agent of the Company's hourly rated non-supervisory employees (over 5,000) at its Point Breeze, Baltimore, plant, and directed disestablishment of that Union. Judge Soper filed a strong dissenting opinion (R. 332-46).

The Company is the manufacturing subsidiary of American Telephone & Telegraph Company, and is engaged almost exclusively in the production of vital communications equipment for the Army and Navy (R. 17, 71).

In April, 1937, the Company terminated an employee representation plan which had been in existence since 1933 (R. 74).

Point Breeze Employees Association, Inc. (hereinafter called the Union) is a Maryland membership corporation (R. 353) formed by the employees of the Point Breeze plant and adopted as bargaining agent by an overwhelming vote at an election by secret ballot in June, 1937 (R. 79-81). The election was conducted by the employees off

Company property and without any advice, assistance or participation on the part of the Company. No complaint about the Union was ever made by any employee during the six years prior to the hearing. The proceeding is based on a charge filed in July, 1943, on behalf of International Association of Machinists by a non-employee organizer (R. 36).

In ordering the disestablishment of the Union, the Board professed to be acting upon a "congeries of facts" (R. 330) claimed to show that the Union was dominated by the Company in its formation in 1937. The principal element of this so-called "congeries" is that *despite the fact that the employees had full knowledge of an announcement by the Company in April, 1937, that the employee representation plan was terminated and that the Company was indifferent as to the choice which the employees might make as to their bargaining agent*, this knowledge on the part of the employees must be deemed insufficient since it did not come in the form of a notice direct from the Company to the individual employees (R. 74, 90). The Board also relied on organizational acts of the employees themselves (R. 76-83, 91-3), as to which it is not even claimed that the Company had any participation or made any suggestion or rendered any assistance, and upon the fact that the Company, as was its legal duty under the Act, recognized a committee elected by an overwhelming majority of the employee body at an election in April, 1937, prior to the organization of the Union, as their bargaining agency for a period of 60 days (R. 79, 91). At the time of this recognition, there was no organizational effort on behalf of any other labor organization (R. 86).

The record contains no evidence whatever that the Union is in fact dominated by the Company, and the Board reached its conclusion of "domination" and issued its order of disestablishment without giving any consideration to the undisputed evidence establishing that the Union is not domi-

nated in fact but is, on the contrary, aggressive and militant. Included in this evidence, all of which is ignored by the Board in its decision, is the report of a panel of the War Labor Board in a hotly disputed case between the Company and the Union in which the panel commented on the aggressiveness of the parties and concluded by saying "This Company and this Union should be encouraged to draw closer together for the benefit of all concerned." (R. 32)

The Board also concluded (R. 84-90, 97) that the Company had interfered with its employees in violation of Section 8(1) of the Act, based on a few alleged incidents occurring between November 1941 and the date of the hearing, incidents with respect to which the Trial Examiner had concluded there was no "substantial credible evidence" (R. 59) and which, even if given credence, involved only 6 supervisory employees at the lowest levels out of over 400, and only 7 out of over 5,000 employees, entailed no disciplinary or discriminatory action of any nature against any employee, are not claimed to have influenced the acts of any employee, and were all well within the exercise of the constitutional right of freedom of speech.

The majority opinion of the Circuit Court of Appeals (R. 323-32) sustains the conclusions of the Board by relying heavily, among other things, on matters not relied on by the Board or as to which the Board made no finding.

Judge Soper's dissenting opinion of 15 pages (R. 332-46) reviews in detail the matters relied upon by the Board, and concludes that as a matter of law there was "no evidence" of domination or interference and "no evidence, worthy of the name" that the Company favored the Union over the I. A. M., the charging labor organization (R. 332). Judge Soper also holds that the report of the panel of the War Labor Board and other undisputed sub-

stantial evidence ignored by the Board show conclusively that the Union is not dominated but is actually independent and aggressive (R. 341-3).

The Company contends that the Decision and Order of the Board and the decision of the majority of the Circuit Court of Appeals conflict with applicable decisions of this Court and of other Circuit Courts of Appeals, and involve important questions in the administration of the Act which have not been, but should be, settled by this Court. A question of improper limitation upon freedom of speech is also involved.

The Questions Presented.

1. May a reviewing court sustain the action of an administrative agency upon grounds upon which the agency itself did not rely, including facts not found by the agency to have occurred? (See (1) under "Reasons" [p. 7] and Point I of Brief [pp. 14-8].)

2. May the Board conclude that a union is dominated, in the absence of any evidence of actual domination and without reviewing and appraising substantial undisputed evidence that the union is actually not dominated but is aggressive and militant, including a report of a panel of the War Labor Board to that effect? (See (2) under "Reasons" [pp. 7-8] and Point II of Brief [pp. 18-23].)

3. May the Board conclude that knowledge by a company's employees of the company's announcement of termination of an employee representation plan and of its neutrality as to their organizational activities is insufficient to constitute a sufficient line of cleavage between the terminated plan and a union subsequently formed, for the reason that they did not acquire such knowledge directly from the company? (See (3) under "Reasons" [pp. 8-9] and Point III of Brief [pp. 23-9].)

4. May the Board base a conclusion that a union was dominated in its formation on organizational activities of the employees themselves, as to which there is no claim that the company in any way advised, assisted or interfered? (See (4) under "Reasons" [p. 9] and Point IV of Brief [pp. 29-30].)

5. May the Board base a conclusion of domination of a union by a company on the fact of performance by the company of its legal duty under the Act of recognizing a committee of employees selected by an overwhelming majority of such employees as their collective bargaining agent, for a period of sixty days, prior to the organization of the union, when there was no organizational effort on behalf of any labor organization other than the union? (See (5) under "Reasons" [p. 10] and Point V of Brief [pp. 31-2].)

6. May the Board base a conclusion of Company domination of a Union formed in 1937, and of interference, on certain alleged incidents (R. 85-9), (a) as to which the Trial Examiner found there was "no substantial credible evidence" (R. 59), (b) which, even if given credence, took place on only a few occasions from and after November, 1941, to July, 1943, (c) which involved only 6 out of over 400 supervisory employees, all at the lowest levels, and only 7 non-supervisory employees out of over 5,000, (d) which entailed no disciplinary or discriminatory action by the Company against any employee and are not claimed to have influenced the action of any employee, and (e) which could amount to no more than the exercise of the right of free speech guaranteed by the Constitution of the United States? (See (6) under "Reasons" [pp. 10-11] and Point VI of Brief [pp. 32-5].)

Reasons Relied on for the Allowance of the Writ.

(1) This Court has held in *Labor Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 478-80 (1941), *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 95 (1943), and *Florida v. United States*, 282 U. S. 194, 214-15 (1931), and in other cases, that the order of an administrative agency cannot be upheld unless the grounds upon which it acted are stated by it and such grounds can be sustained. Here the majority of the Circuit Court of Appeals rely heavily on matters (set forth in the attached Brief, pp. 14-6) not stated by the Board to be grounds upon which it relied, including facts not even found by the Board to have occurred, and sustained the Board on the combined and inseparable basis of such matters and others. It is the function of the Board, not the Circuit Court of Appeals, to state whether or not it relies on such matters as grounds for its conclusions. This usurpation by the Circuit Court of Appeals of the function of the Board is clearly contrary to principles of administrative law laid down by this Court. (See Point I of Brief [pp. 14-8].)

(2) The decision of the Circuit Court of Appeals is in conflict with the holding of this Court in *Labor Board v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50 (1943). In that case this Court held that the ultimate issue in an alleged "domination" case under the Act is whether the labor organization in question is at the time of the proceeding actually dominated, and that it is the duty of the Board to review and appraise the evidence as to the present actual domination or independence of such labor organization. Here the Circuit Court of Appeals sustained the order of the Board, based on its conclusion of domination, notwithstanding that there was no evidence of actual domination and the Board did not in its decision review and appraise the very substantial evidence showing

that the Union is not actually dominated but on the contrary is aggressive and militant. Included in this evidence is a report by a panel of the War Labor Board to that effect.

That the Board must make such a review and appraisal in order to make a proper finding of domination or independence is an important requirement in the administration of the Act.

The importance of this requirement is emphasized by the fact that the Board ignored the report and recommendation of a coordinate federal agency. As Judge Soper said in his dissent in summarizing the substantial evidence of independence of the Union (R. 341-3), it is abhorrent and harassing for a company to be told by one federal agency, the War Labor Board, that it must draw closer to a labor organization in the interests of the war effort and, at the same time, to have another federal agency, the National Labor Relations Board, tell the same company to have no relations with the same labor organization. The company is expected to obey both. (See Point II of Brief [pp. 18-23].)

(3) On another important matter in the administration of the Act, the decision of the Circuit Court of Appeals for the Fourth Circuit is in conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit, and is so recognized by Judge Soper in his dissent (R. 335).

In *Labor Board v. Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594, 596 (C. C. A. 7, 1944), the Circuit Court of Appeals for the Seventh Circuit held that in order that there might be an undominated independent union after termination of an illegal employee representation plan, there was no requirement that the company's announcement of termination of the plan and its indifference to the employees' organizational efforts be given in any particular "formal mechanical pattern" directly by the company to its employees as a whole, so long as the company did make the announcement and the company's position is actually

known by the employees. In the case at bar the majority of the Circuit Court of Appeals for the Fourth Circuit has sustained a conclusion of the Board that the Union was dominated by the Company in its formation in 1937, based fundamentally on the ground that the Company did not make its announcement directly to its employees as a whole in some particular "formal mechanical pattern," *notwithstanding that the Company made the announcement and the Board itself found that it became a matter of general knowledge among the employee body* (R. 74).

This finding of the Board definitely determines that the employees had knowledge of the Company's announcement. Consequently the case squarely presents the issue of whether there is any requirement of law that the knowledge must be acquired by some particular method (See Point III of Brief [pp. 23-9]).

(4) The Circuit Courts of Appeals for the Fifth and Seventh Circuits have held in the cases cited in the attached brief (*infra*, p. 30) that acts by the employees themselves, not instigated or participated in by a company, in the formation of a labor organization cannot be relied on by the Board as the basis of a conclusion of domination of the labor organization by the company.

Directly contrary to these decisions in other Circuits, the Circuit Court of Appeals for the Fourth Circuit has here sustained a conclusion of the Board that the Union in its formation was dominated by the Company, based on acts of the employees themselves, as to which it is not even claimed that the Company participated or made any suggestions or gave any assistance.

It is clear that this is a matter of great importance in the administration of the Act which has not been, but should be, settled by this Court. (See Point IV of Brief [pp. 29-30].)

(5) The Circuit Courts of Appeals for the Ninth, Eighth and Seventh Circuits, in cases cited in the attached brief (*infra*, p. 31), have held that the performance by a company of its legal duty under the Act of recognizing a bargaining agency elected by a majority of its employees cannot be the basis of a conclusion of domination by the company, particularly where, as in this case, there was no other labor organization making a contest or even an organizational effort at the plant.

The decision of the Circuit Court of Appeals for the Fourth Circuit in this case is directly to the contrary. (See Point V of Brief [pp. 31-2].)

(6) There is in this case no background of Company hostility to unions which would serve to give significance to the alleged incidents of interference on which the Board relied, or make them attributable to the Company. In these circumstances, we submit that, as Judge Soper's review shows (R. 343-6), both the Board and the majority of the Circuit Court of Appeals have laid down an erroneous principle of substantial importance in the administration of the Act, in approving the use, either on the issue of domination in the formation of the Union in 1937, or on the issue of interference, of alleged incidents which, if they occurred at all,

(a) did not first occur until 1941 and thereafter took place on only a few scattered occasions;

(b) involved only 6 supervisory employees, all at the lowest levels of supervision, out of a total of over 400 and only 7 non-supervisory employees out of over 5,000;

(c) in no instance involved any coercion or disciplinary action or influenced the action of a single employee;

(d) entailed no expression or implication that the Company, or any policy-making official of the

Company, prompted the action of the supervisor involved; and

(e) even if attributable to the Company, were plain instances of the exercise of the right of free speech guaranteed by the Constitution of the United States.

The decision of the Circuit Court of Appeals for the Fourth Circuit herein is in this respect in conflict with the decisions of this Court and of the Circuit Courts of Appeals for the Second, Third and Fifth Circuits cited in the attached brief. (See Point VI of Brief [pp. 32-5].)

If this decision of the majority of the Circuit Court of Appeals stands, it will result in irreparable injustice and injury to the Company and to its employees at the Point Breeze plant.

The Company will stand convicted before its employees of having engaged in unfair labor practices and of having dominated the formation of a labor organization of its employees, notwithstanding that neither the Company nor any upper-level supervisor is even claimed to have committed a single improper act at any time or to have had anything to do with the organization of the Union.

The employees at the Point Breeze plant will be deprived of a free choice of a labor organization to represent them as bargaining agent, because the Union will not be permitted to appear on the ballot in the forthcoming election in the representation case now pending before the Board, brought by the I. A. M., the charging union herein.

The only way the employees will obtain a free choice in the forthcoming election and the policy of the Act will be carried out, is to reverse the Board's order so as to permit the Union to appear on the ballot along with the I. A. M., as pointed out by counsel for the Union in the

argument before the Circuit Court of Appeals. It is the policy of the Act to protect the employees in their free choice and not to benefit any one union, such as the I. A. M.

WHEREFORE, it is respectfully submitted that because of the importance in the administration of the Act of the questions presented and the other reasons set forth above, this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit should be granted.

WESTERN ELECTRIC COMPANY, INCORPORATED,
Petitioner,

By

R. DORSEY WATKINS
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February 26, 1945.



BRIEF IN SUPPORT OF PETITION.

The Opinions Below.

The majority and minority opinions of the Circuit Court of Appeals for the Fourth Circuit (R. 323-46) were rendered on January 3, 1945, but have not yet been officially reported. The opinion of the Board (R. 64-99) rendered August 9, 1944, has not yet been officially reported.

Statute Involved.

The statute involved is the National Labor Relations Act, 49 Stat., 449. The Board's order related to alleged violations of Section 8 (1) and (2) of the Act, which read as follows:

"SEC. 8. It shall be an unfair labor practice for an employer——

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

Section 7, referred to in Section 8(1) above, reads as follows:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Specification of Errors.

The Circuit Court of Appeals, in sustaining the order of the Board, erred in each and all of the respects referred to in the point headings below.

I. It was error for the Circuit Court of Appeals to sustain the order of the Board on grounds not relied on by the Board, including facts not even found by the Board to have occurred.

The majority of the Circuit Court of Appeals in their opinion support the conclusion of the Board on the basis, among others, of five matters not relied on by the Board or mentioned by the Board in its decision, at the same time stating the principle: " * * * we may not substitute our own conclusions for those of the Board." (R. 325)

1. The majority of the Court list in summary fashion, near the end of their opinion (R. 331), matters which they stress as supporting the Board's conclusion. Upon the crucial question of the sufficiency of the knowledge received by the employees of the Company's announcement of termination of the employee representation plan and the Company's neutrality, the majority of the Circuit Court of Appeals state, as No. 2 of their summary list (R., 331): "(2) An equivocal second-hand announcement as to the dissolution of the Plan;". As support for the Court's statement that the Company's announcement of the dissolution of the plan was equivocal and improper, the Court relies heavily upon the asserted fact (R. 326) that Schmidt, one of the employee representatives, made a misleading statement to employee Mileski as to the significance of the Company's announcement. But the Board made no such finding. In fact, there is not a word in the Board's decision which directly or indirectly refers to any such occurrence. The reason why the Board made no such finding is obvious, for there is no testimony in the record to that effect. The

only reference made by Mileski in his testimony to a conversation with Schmidt was fixed by Mileski as occurring in August, 1933, four years before the formation of the Union, and had to do, not with the Union, but with the employee representation plan which was then being formed (R. 154).

2. On a similar critical issue in the case, namely the understanding of the employees as to the Company's position, the majority of the Court list, as No. 5 of their summary list (R. 331): "(5) An obvious belief by the employees that the Company desired an independent, rather than an outside, union;". No such statement is made by the Board anywhere in its decision and there is no evidence in the record to that effect. On the contrary, the uncontradicted evidence is that no employee voted for the Union because he thought the Company wanted him to (Typewritten testimony, p. 147). We are at a loss to know from what source the majority of the Court drew this inference on this vital matter.

3. Another important matter listed in the summary of the majority of the Court is: "(6) Swift grant to the Association by the Company of a check-off of dues, wage increases and other favors;" (R. 331). The question whether there was any significance in the so-called "check-off of dues" (actually a voluntary and revocable dues deduction, and so designated by the Board [R. 83]) and wage increases under the circumstances in this case (where there was no other labor organization making any contest, or, in fact, any organizational effort [R. 86]) was briefed before the Board. The I. A. M., the charging union, argued that the matter had significance. The Company argued that it did not. The Board in its decision merely mentions the dues deduction and wage increase in its statement of history, but they are not relied on by the Board as significant matters, for they are not among the matters set forth in the conclusory part of the decision of the Board as showing domina-

tion of the Union (R. 90-95). As Judge Soper says in his dissent (R. 340), these matters "are not mentioned in the Board's argument as having this significance."

4. In addition to the three matters included in their numerical summary and above discussed, the majority of the Court, in supporting the conclusion of the Board, also lay stress (R. 330) on an alleged incident in 1939, involving Leichsenring, a supervisory employee. Indeed, this incident is further relied on by the majority as a basis for the seventh matter in their summary list, *i. e.*, "(7) Expressions of opinions hostile to outside unions made by supervisory officials to employees." (R. 331) The Board in its decision (R. 85-90) detailed the incidents which it deemed significant. Nowhere in this section of the report, or anywhere else, did the Board mention the alleged Leichsenring incident.

5. Again, the majority of the Court, in supporting the conclusion of the Board, lay stress (R. 330) on alleged incidents involving Mercer, a supervisor. As in the case of the matter just previously discussed, the Board, neither in the section of its decision dealing with incidents deemed by it to be significant (R. 85-90) nor elsewhere in its decision, mentioned Mercer.

The Board apparently agreed with the Trial Examiner that the Leichsenring and Mercer incidents either did not occur or had no significance. Surely the majority of the Circuit Court of Appeals cannot properly support the conclusion of the Board by requiring the Board to credit testimony which it has rejected.

Labor Board v. Virginia Electric & Power Co., 314 U. S. 469, 478-80 (1941), *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 95 (1943), *Florida v. United States*, 282 U. S. 194, 214-5 (1931), *Texas and Pacific Railway Co. v. Interstate Commerce Commission*, 162 U. S. 197, 237-9 (1896), and other decisions of this Court, establish that it is the function of administrative agencies to draw

conclusions and to state the grounds on which they rely in reaching their ultimate decision and that it is not for the courts to perform either the function of making findings of fact from a record on which the agency itself has not found such facts, or of drawing inferences from facts where the agency has not drawn such inferences. As this Court said in the *Chenery Corporation* case, *supra* [318 U. S., at p. 88]:

“For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.”

It was, therefore, improper for the Circuit Court of Appeals in this case to attempt to support the decision of the Board on the basis of five findings relating to critical issues made by the Court, but not made or relied on by the Board. These five matters are not incidental trivia in the opinion of the majority of the Court, but are matters which they considered vital to the validity of the Board's order.

This feature of the case is illustrative of an intolerable situation which would confront litigants in **proceedings before** administrative agencies if this sort of procedure were to be upheld. The Trial Examiner found that there was “no substantial credible evidence” of any of the alleged incidents. The charging union, the I. A. M., took no exceptions but moved to have the Examiner's report confirmed as a whole by the Board (R. 68). Consequently, none of the incidents was briefed or argued before the Board. Nevertheless, the Board reinjected some incidents into the case, but not the incidents involving Leichsenring or Mercer, to which the majority of the Circuit Court of Appeals advert. While we argued before the Circuit Court of Appeals as to the few incidents which the Board did mention in its report, we naturally did not argue or brief the incidents relating to Leichsenring or Mercer. How can a litigant protect his rights if at each stage of a proceeding he meets the issues presented to him, but is confronted in the decision of the

tribunal with other matters which he has had no opportunity or occasion to meet before that tribunal? This matter is one of great importance in the administration of the Act and in federal administrative law generally, which this Court should resolve.

II. The order of the Board disestablishing the Union should not have been sustained since there is no evidence of actual domination and the Board failed to review and appraise substantial undisputed evidence that the Union is actually not dominated but is aggressive and militant, including a report of a panel of the War Labor Board to that effect.

Upon the face of the Act the ultimate question involved in any case in which the Board charges domination of a labor organization and orders disestablishment and the withdrawal of recognition from that organization, is whether a situation presently exists which requires correction and calls for remedial action by the Board. The Act itself is remedial, not punitive. *Republic Steel Corp. v. Labor Board*, 311 U. S. 7, 10-1 (1940).

The decision of this court in *Labor Board v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50 (1943), establishes that in the present case the Board has proceeded in a manner not authorized by the Act. That this Court has taken the position that the ultimate issue in a domination case is whether the labor organization in question is in fact presently dominated by the employer, is, we think, clear from the following language of the opinion (319 U. S., at p. 60):

“A genuinely free union composed of employees of one corporation alone may satisfy the requirements of §7 but where, as here, evidence exists of original employer interference, the Board may appraise the situation and even forbid the appearance of such a

union on the ballot to select bargaining representatives where in the Board's judgment the evidence does not establish *the union's present freedom from employer control.*" (Italics ours.)

The basic principle that an administrative agency must review and appraise the evidence bearing on the ultimate issue presented to it, and make a specific finding on that issue, has been enunciated by this Court on other occasions, *e. g.*, *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-9 (1942), *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 195-7 (1941).

It is plain from the decision of the Board that it did not appraise the present situation to determine whether or not in fact the Union is actually dominated. The Board did not consider "the union's present freedom from employer control" as required by the *Southern Bell* case, quoted above.

There is no evidence of actual domination in the record and there is no finding of fact by the Board that the Union is presently dominated. The Board states this as a conclusion (R. 94), but it clearly appears from its decision that this conclusion is based solely on conclusions drawn from events at the time of the organization of the Union in 1937 and that in reaching such conclusion no attempt was made to appraise the present situation.

This conclusion of the Board (R. 94) starts with the phrase "Upon the basis of the foregoing facts". "The foregoing facts" set forth in the preceding statements in this portion of the decision (R. 90-94) all relate to the events of 1937. There is no finding of fact regarding the situation at the plant today.

Thus, the Board has declined to commit itself on the crucial question of present actual domination or independence of the Union. We submit that there can be no doubt but that, under the *Southern Bell* and other decisions of this Court, this is an error of law which vitiates the Board's order.

The Board did notice (R. 94-95) that the Company raised the question of present domination, but the manner in which the Board addressed itself to the point is erroneous in fact and in law. The Board in its decision implied, contrary to fact, that the Company, conceding domination of the Union, relied by way of exculpation on certain benefits secured by the Union for the employees as a result of bargaining. The Board then dismissed the whole question of present domination, the sole ultimate issue in the case, by saying, "the procurement of benefits by a labor organization is immaterial if, in fact, the employer has interfered with, dominated or supported the organization." (R. 94-95)

The record is entirely different. The Company denied domination and the record contains conclusive and undisputed evidence (of which benefits were only an incidental part) showing that in fact the Union is strong, independent and aggressive and not dominated.

This error of the Board is magnified by the circumstance that the substantial evidence of the Union's independence and militancy includes one item of a most significant and persuasive nature. This is the report of a panel of the War Labor Board to the effect that the Union is too aggressive and militant toward the Company. The panel urged the Company and the Union to work together more closely. The weight to which this evidence was entitled is well expressed by Judge Soper in his dissenting opinion (R. 342-3) as follows:

"The clearest evidence of this fact [complete independence of the Union], which is entirely ignored in the opinion of the Board, is the report of the War Labor Board at the conclusion of a proceeding in which that Board undertook to resolve an impasse between the Company and the Association in respect to certain matters in dispute. The attitude of the Association and of the Company representing their respective sides showed such independence and militancy that the Board in its final report on April

30, 1943 criticized them both in the following language:

“The two parties appear to have bargained as company and union since 1937, a very short time. With the best of intentions, the difficulties attendant upon the development of new ways of thinking and of dealing are not easily resolved in the early years of collective bargaining. Neither party is entirely sure of itself or of the other. Under wartime pressures, it is doubly hard to learn by studying the experience of others, or by devoting adequate time to one's own problems. Consequently, differences of opinion drag on and become serious obstacles to cooperation. A tendency to question the sincerity and motives of the other side creeps in. If to this is added some degree of aggressiveness on either side, continual irritation seems bound to ensue.

“Something of this sort seems to be true in this case. The remedy appears to be to expedite in every possible way the development of one complete collective agreement, which would be sufficiently complete and accurate that it would remain in force indefinitely. This Company and this Union should be encouraged to draw closer together for the benefit of all concerned.’

“What more convincing affirmative proof of the Association's complete freedom from undue influence of the Company could be had than this finding of an impartial and responsible agency? One may well ask what standard of conduct the participants in an industry should adopt when one agency of the government condemns their relations as unduly intimate and close, while another government agency at the same time stigmatizes their attitude towards each other as so hostile as to interfere with efficient production.” (Italics ours.)

The Board also ignored other undisputed substantial evidence that the Union is not dominated by the Company

but is in fact free and independent. Such evidence and its effect is likewise summarized in the dissenting opinion (R. 341-2), viz.:

“ * * * What follows shows with equal certainty that in its administration the Association has remained the free and uncontrolled representative of the men. It is incorporated under the Maryland law with a board of representatives or directors, now consisting of thirty-nine men who in turn elect the officers. The board meets monthly and more often when necessary. The members meet at least once a year. The expenses are met entirely from the dues and property of the Association without outside aid from any source.

“Radical changes in personnel have occurred during the six year period since the Association was organized in June, 1937. There were then 1872 employees at the plant; at the present time 5100. In September, 1937 there were 1772 members and in May, 1943, 2896 members. There is no closed shop agreement requiring any employees to come into the Association. The Board of Governors, which originally consisted of 24, now has 39 elected members, and in 1943 only 2 of these were on the Board in 1937. None of the officers of the Association elected in June, 1937 were officers in 1943.

“It seems obvious, in view of these changes, that even if there had been unlawful Company influence or domination in the establishment of the Association, it would long since have been dissipated. In any event, the undisputed facts demonstrate the complete independence of the Association. Its Board of Representatives has been active on behalf of the men. There were 140 bargaining conferences between the Company and the Association in the period 1937 to 1943. In 1939 the Association was affiliated with a national committee consisting of representatives of the unions in the Company's different plants and division[s]. This organization has bargained with the Company on matters of Company wide application in seventy conferences between 1939 and 1943.

The record of these transactions indicates collective bargaining in the orthodox manner between active and independent parties and contains no hint that at any time the Board of Representatives has failed to represent the employees or has been coerced or interfered with in the exercise of its functions by the Company."

Like the Board, the majority of the Circuit Court of Appeals completely ignore the report of the panel of the War Labor Board and the other undisputed substantial evidence that the Union is not presently dominated but is aggressive and militant; instead the majority simply mention the contention that the Union is not dominated by the Company and then refer to alleged incidents of interference, matters dealt with in Point VI this Brief, and nowhere discuss the failure of the Board to consider and and appraise the report of the panel of the War Labor Board and the other evidence of the independence and aggressiveness of the Union. We respectfully submit that such federal administrative procedure, which calls forth such a vigorous protest by a Judge of the Circuit Court of Appeals, merits the consideration of this Court.

III. The order of the Board should not have been sustained, since the Board based its conclusion that the Company dominated the Union in its formation in 1937 principally on the ritualistic contention that, although the Company's announcement of termination of an employee representation plan and of its indifference to the employees' organizational efforts was made and concededly became a matter of common knowledge among the employees, the knowledge so acquired by the employees must be deemed insufficient since it did not come in the form of a direct notice from the Company to the individual employees.

In reaching its conclusion that the Union was dominated by the Company in its organization, the Board relied

principally on the fact that notice of the Company's announcement of termination of the plan and its indifference to the organizational efforts of its employees was not given in some "formal mechanical pattern" directly by the Company to its employees (R. 90). The Board, however, conceded that the announcement was made and that it became a matter of general information among the employees (R. 74).

We submit that the only legal requirement in such a situation is that the employees as a whole should know of the company's announcement of termination of the plan and of the company's neutrality, and that no particular "formal mechanical pattern" of notice is required. The Circuit Court of Appeals for the Seventh Circuit has so held in *Labor Board v. Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594, 596 (C. C. A. 7, 1944).

In that case the facts were identical with those in the present case (except that the Board did not there find that the notice became a matter of common knowledge among the employees, as it found here) and are succinctly described by the Circuit Court of Appeals for the Seventh Circuit as follows:

"During May, 1937, Juttemeyer [Personnel Manager], at a meeting of the representatives of E. R. P. told them that the company could no longer be a party to or recognize the existing organization; that E. R. P. by virtue of the Supreme Court's decision, was 'outlawed,' and that they would have to do 'something else,' 'whatever they wanted to do'; that it was up to them to decide what they wished to do."

As to the sufficiency of this notice, that Court said (p. 596):

"We think the Board's evidence justifies only the finding that, in the hearing here, the test [of sufficient cleavage] was fully met. True, respondent did not circularize each member of the E. R. P. with notice of cessation of support of the E. R. P. However,

we can not, *nor can the Board, after seven years, say that it was necessary for respondent to follow any certain formal mechanical pattern of procedure* in order to evince disestablishment, inasmuch as the evidence establishes beyond peradventure an honest, active and successful effort by respondent to effectuate its detachment, and clear understanding of the attitude of the employer in this regard upon the part of the employees." (Italics ours.)

Westinghouse Elec. & Mfg. Co. v. Labor Board, 112 F. 2d 657 (C. C. A. 2, 1940); aff'd 312 U. S. 660, is not to the contrary. There the Board had specifically found that the company's statement had never been conveyed "to the employees generally, in any manner." (18 N. L. R. B., at p. 313) The majority of the Circuit Court of Appeals for the Second Circuit unquestionably thought, as their opinion shows, that this was the controlling circumstance in the case. Circuit Judge Swan dissented because he believed that the company's announcement to the representatives "was undoubtedly spread among the employees by those to whom it was made." (112 F. 2d, at p. 661)

The evidence in this record as to the nature of the Company's announcement and the manner of its transmission to the employees in the present case is thus summarized in the dissenting opinion of Judge Soper (R. 334):

"A few days after April 12, 1937, when the Jones and Laughlin decision was handed down, the works manager announced at a meeting of employee representatives that the Plan was 'out'; that it was at an end; that the company could no longer bargain with them and that the employees were free to set up or join any organization that they desired.
• • •

"The employee representatives passed on the notice received from the Company to their constituents. The representatives, nearly all of whom testified, were unanimous in saying that they reported

to the men what had taken place at the meeting with the manager. Their uncontradicted evidence made it abundantly clear that the Plan was out, that they could no longer represent the men or bargain with the management, that the men would have to get a new union or form one of their own or choose any organization that they preferred, and that it was immaterial to the Company what action they might take. This information passed through the body of the employees like wild fire, but it did not come with the shock of a surprise because the men, by reason of their familiarity with labor matters were expecting it."

Judge Soper went on (R. 335) to point out that under both the *Duncan Foundry* case and the *Westinghouse* case this notice was amply sufficient to constitute a clear line of cleavage between the employee representation plan and the Union subsequently formed.

The majority say nothing inconsistent with the evidence above summarized by Judge Soper. They characterize the Company's announcement as "equivocal" and "ambiguous" (R. 331, 328), but do not point out how an announcement that the employee representation plan was "out" and that employees were free to form an organization on the outside, or to form their own union, or to join anything they wanted to, could be ambiguous or equivocal. Also as grounds of objection to the Company's announcement, the majority point (R. 326) to the non-existent Mileski-Schmidt incident (disposed of *supra*, pp. 14-5) and to the issuance of circulars, concededly "not binding on the Company" (R. 326), containing statements of reasons for the termination of the plan, which, though concededly true as far as they went, were allegedly incomplete. But the majority do not indicate how any employee statements regarding the reasons for the termination of the plan could negative the employees' knowledge of the pivotal facts that the plan had been terminated and that the Company was neutral, or

how a direct announcement from the Company to the employees could have prevented the issuance of such circulars.

The effort of the majority below to dispose of the *Duncan Foundry* decision is ineffective. The majority say that in the *Duncan Foundry* case the employees obtained a "clear understanding of the attitude of the employer", implying that they did not in the present case, notwithstanding that the Board in the *Duncan Foundry* case made no finding that the company's announcement became a matter of general knowledge but made an express finding in the present case to that effect. The quotation used by the majority is not from the Board's decision but from the Court's opinion in the *Duncan Foundry* case. That Court made that holding on a set of facts and of findings by the Board entirely similar to those in the present case, except that, as previously stated, in the *Duncan Foundry* case the Board made no finding that the company's announcement became a matter of general knowledge among the employees.

It is therefore no answer to the *Duncan Foundry* case to say, as the majority say in the case at bar, that here "the Board has found that the Company failed properly to bring home to its employees" the necessary announcement. The Board in the *Duncan Foundry* case had reached the same conclusion as to improper notice as appears from the following excerpt from its report of the case (50 N. L. R. B. 609, at p. 636):

"Afterwards, about May 1937, the respondent informed the representatives that the E. R. P. was illegal under the Act and that something else would have to be done. No disavowal of the E. R. P. was ever made to the employees. Not only did the respondent fail to take formal action disestablishing the E. R. P. but the representatives themselves took no such formal action. It cannot be held that the word of mouth discussions which took place in the plant or the opening statement of Chairman Cannon at the meeting of June 4, 1937, constituted a dis-

establishment of the E. R. P. or freed the minds of the respondent's employees from the pattern of domination which had clearly developed under the E. R. P."

The foregoing finding could not be sustained upon the evidence in the *Duncan Foundry* case. *A fortiori*, the conclusion of the Board in the case at bar, that the Company's announcement of termination was insufficient to constitute a "clear line of cleavage", cannot be sustained in face of the finding of the Board that (R. 74):

"Meese's [Works Manager] statement was reported by the representatives to their constituents in the various departments of the plant *and it became a matter of general information*. In general, the representatives told the employees that the respondent would no longer recognize the Plan, and that the Plan was 'out'." (Italics ours.)

No other conclusion can be reached but that the decision of the majority of the Circuit Court of Appeals for the Fourth Circuit here is in direct conflict with that of the Circuit Court of Appeals for the Seventh Circuit in the *Duncan Foundry* case. Moreover, this question of whether a company's announcement of the termination of an employee representation plan must be made in some "formal mechanical pattern of procedure" in order that there may be a subsequent legal union is certainly a matter of great importance in the administration of the Act which should be settled by this Court.

Nor can the error of the Board and the Court in relying upon this alleged lack of sufficient notice be disregarded on the theory that there are other grounds upon which the decision of the Board might be supported. The Board has not purported to act upon several independent alternative grounds, but upon the aggregate of a "whole congeries of facts" (R. 330) of which this alleged insufficiency of notice was the pivotal element. If the Board was not, as a

matter of law, entitled to rely on the claimed lack of sufficient notice, the reviewing court is not in a position to assume what conclusion the Board would have reached if the Board had not taken that fact into consideration. (*Labor Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 478-80 [1941]; *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 95 [1943].)

This principle is also applicable to the other improper elements relied on by the Board discussed below in Points IV and V.

IV. The order of the Board should not have been sustained, since the Board, in concluding that the Company was dominating the Union in its formation in 1937, relied on organizational activities of the employees themselves, although there is not even a claim that the Company in any way advised or assisted or interfered with their organizational work.

The Board in its decision (R. 90-93) placed substantial reliance, in reaching its conclusion that the Union was dominated by the Company in its formation, on certain organizational actions taken by the employees themselves. These actions were (a) the election by the employees of former representatives under the employee representation plan to draft a form of labor organization to be submitted for the approval or rejection of the employees at a second election; (b) some use by the employees of a copy of the plan in drafting the constitution and by-laws of the Union so that some formal similarities were present (the Board, however, finding that the principal provisions of the plan were omitted, [R. 82-3]); (c) the insertion by the employees into the by-laws of the Union of an alleged provision requiring that a representative of a district must work in that district (although there was in fact no such by-law upon organization of the Union [R. 255-66]); and (d) the

adoption by the employees of certain election machinery for the two elections, whereby a committee was elected to submit a draft of a form of labor organization and then the labor organization thus submitted was voted on.

There is no finding or claim by the Board that the Company participated in any way or interfered with or advised in respect of these organizational activities of the employees

The Circuit Courts of Appeals for the Seventh and Fifth Circuits have held that action taken by employees themselves in the formation of a labor organization can not properly be relied on in reaching a conclusion that such labor organization was dominated by a company in its formation, when the company did not participate or advise or assist in such action of its employees.

Commonwealth Edison Co. v. Labor Board, 135 F. 2d 891 (C. C. A. 7, 1943);

Footo Bros. Gear & Mach. Corp. v. Labor Board, 114 F. 2d 611 (C. C. A. 7, 1940; remanded for decision on certified record, 311 U. S. 620; and former decision adhered to, 121 F. 2d 802);

Labor Board v. Duncan Foundry & Machine Works, Inc., 142 F. 2d 594 (C. C. A. 7, 1944);

A. E. Staley Mfg. Co. v. Labor Board, 117 F. 2d 868 (C. C. A. 7, 1940);

Magnolia Petroleum Co. v. Labor Board, 112 F. 2d 545 (C. C. A. 5, 1940);

Humble Oil & Refining Co. v. Labor Board, 113 F. 2d 85 (C. C. A. 5, 1940).

The doctrine enunciated by these decisions would certainly seem to be sound on principle. In any event, they establish in other circuits a rule which is contrary to the rule applied in the present case by the Circuit Court of Appeals for the Fourth Circuit. This divergence of views among the circuits, on a matter which is important in the administration of the Act, calls for resolution by this Court.

V. The order of the Board should not have been sustained, since the Board, in concluding that the Union was dominated by the Company, relied on the fact of performance by the Company of its legal duty under the Act of recognizing a committee of employees elected by the overwhelming majority of its employees as the collective bargaining agent of the employees for a period of sixty days, prior to the organization of the Union, when there was no contest or organizational effort on behalf of any other labor organization.

The Board placed stress in the conclusory part of its decision (R. 91) on the recognition by the Company of a committee elected by a majority of the employees as bargaining agent for a period of sixty days for the employees at the plant prior to the organization of the Union in June 1937. No other labor organization was making any contest or in fact engaging in any organizational effort at the plant at the time, and no such effort occurred until 1943, as found by the Board (R. 86).

The Circuit Courts of Appeals for the Ninth, Eighth and Seventh Circuits have held that recognition of the agency chosen by a majority of a company's employees is the legal duty of a company, and that no conclusion of domination by the company can be drawn from such recognition, however promptly accorded, particularly where, as here, there was no other labor organization making any organizational effort whatever.

Labor Board v. Hollywood-Maxwell Co., 126 F. 2d 815 (C. C. A. 9, 1942);

Cupples Co. Manufacturers v. Labor Board, 106 F. 2d 100 (C. C. A. 8, 1939);

Foote Bros. Gear & Mach. Corp. v. Labor Board, 114 F. 2d 611 (C. C. A. 7, 1940).

Here, again, on this important matter in the administration of the Act, the decision of the Circuit Court of Appeals for the Fourth Circuit herein is in conflict with the decisions in other circuits which seem sound on principle. Certainly this question, which has not been passed on by this Court, should be resolved.

VI. It was error for the Circuit Court of Appeals to approve the reliance by the Board on alleged incidents of preferential treatment of the Union or opposition to the I. A. M. by the Company.

The discussion in Point I of this brief relates, among other things, to alleged incidents upon which the Board itself did not rely in reaching its conclusion of domination and interference. We there adverted to the intolerable situation in which litigants before administrative agencies would be placed if the orders of such agencies could be sustained upon grounds on which they have not relied.

The Board did use other alleged incidents with respect to which the Trial Examiner had found that there was "no substantial credible evidence" (R. 59). The considerations advanced in Point I apply to these incidents. Neither the Act nor the regulations of the Board furnish any machinery by which the Company could protect itself against these allegations in view of the way the record developed.

Once the Trial Examiner had rejected these incidents and recommended that the charge of interference be dismissed, the Company was unable to guard itself against a reinjection of these matters by the Board. Under the rules of the Board, no matter in the Trial Examiner's intermediate report may be objected to before the Board in the absence of exceptions (NLRB Rule 33). No such exceptions were filed to the Trial Examiner's disposition of these alleged incidents. The I. A. M., the charging union, asked

that the Trial Examiner's report be adopted without change. Consequently, there was no occasion or opportunity for the Company to brief or argue them before the Board, and they were neither briefed nor argued, nor did the Board ask for any discussion of them. After the Board, by its decision, had reinjected certain of the incidents, the Company urged in the Circuit Court of Appeals that such use of the incidents by the Board was improper. Nevertheless, the majority of the Court also rely upon these alleged incidents and in addition, as already stated, add other incidents on which the Board itself did not rely.

We emphasize the importance in the administration of the Act of a decision by this Court as to the propriety in administrative proceedings of the above described procedure.

Moreover, the incidents themselves, even if taken at full face value, were entitled to no consideration whatever as the basis of a finding either of domination or of interference. They involved only seven nonsupervisory employees out of over 5,000 and only six supervisory employees, all at the lowest levels, out of over 400. There was not the remotest suggestion that any policy-making official of the Company had any part in them or that any of them involved any coercion or disciplinary action.

In giving significance to any such alleged incidents, the Board, and the majority of the Circuit Court of Appeals for the Fourth Circuit, have made a decision in conflict with the following decisions of this Court and the Circuit Courts of Appeals for the Second, Third and Fifth Circuits.

Labor Board v. Virginia Electric & Power Co.,
314 U. S. 469, 477, 479 (1941);

Labor Board v. American Tube Bending Co.,
134 F. 2d 993, 995 (C. C. A. 2, 1943); cert. den.
320 U. S. 768;

Jacksonville Paper Co. v. Labor Board, 137 F.
2d 148, 152 (C. C. A. 5, 1943); cert. den.
320 U. S. 772;

Labor Board v. Sun Shipbuilding & Dry Dock Co., 135 F. 2d 15 (C. C. A. 3, 1943);
Magnolia Petroleum Co. v. Labor Board, 112 F. 2d 545, 551-2 (C. C. A. 5, 1940);
Humble Oil & Refining Co. v. Labor Board, 113 F. 2d 85, 92 (C. C. A. 5, 1940).

See also:

Labor Board v. Sands Mfg. Co., 306 U. S. 332, 342 (1939).

All of the foregoing cases establish the principle that actions and statements of minor supervisory employees are not attributable to the Company in the absence of any background indicating that the Company sponsored or approved any preferential, discriminatory or anti-union activity on the part of such minor supervisors, and that to the extent that such incidents involve expressions of views by supervisory employees, or even by the Company, they are protected by the constitutional guarantee of freedom of speech.

In contrast to the casual and uncritical manner in which the majority opinion of the Circuit Court of Appeals accepts these incidents as grounds for the Board's action, the dissenting opinion (R. 343-6) contains a careful and analytical examination of each of them and concludes, on the basis of the facts shown by the record and the applicable authorities, that the Board, as a matter of law, was not entitled to use them as the basis for any conclusion whatever.

We submit that it is an important question in the administration of the Act whether the Board may go out of its way to charge employers who operate huge and intricate industrial establishments with responsibility for the kind of uncontrollable and insignificant trivia mentioned in the Board's findings. To say that such matters "lend color to the over-all picture" or that, on the other hand, a hypothetical "over-all picture" gives significance to them

is, on this record, a mere linguistic fiction on the basis of which serious blame is imputed to an employer against whom no suspicion of anti-union activity or attitude can otherwise be directed.

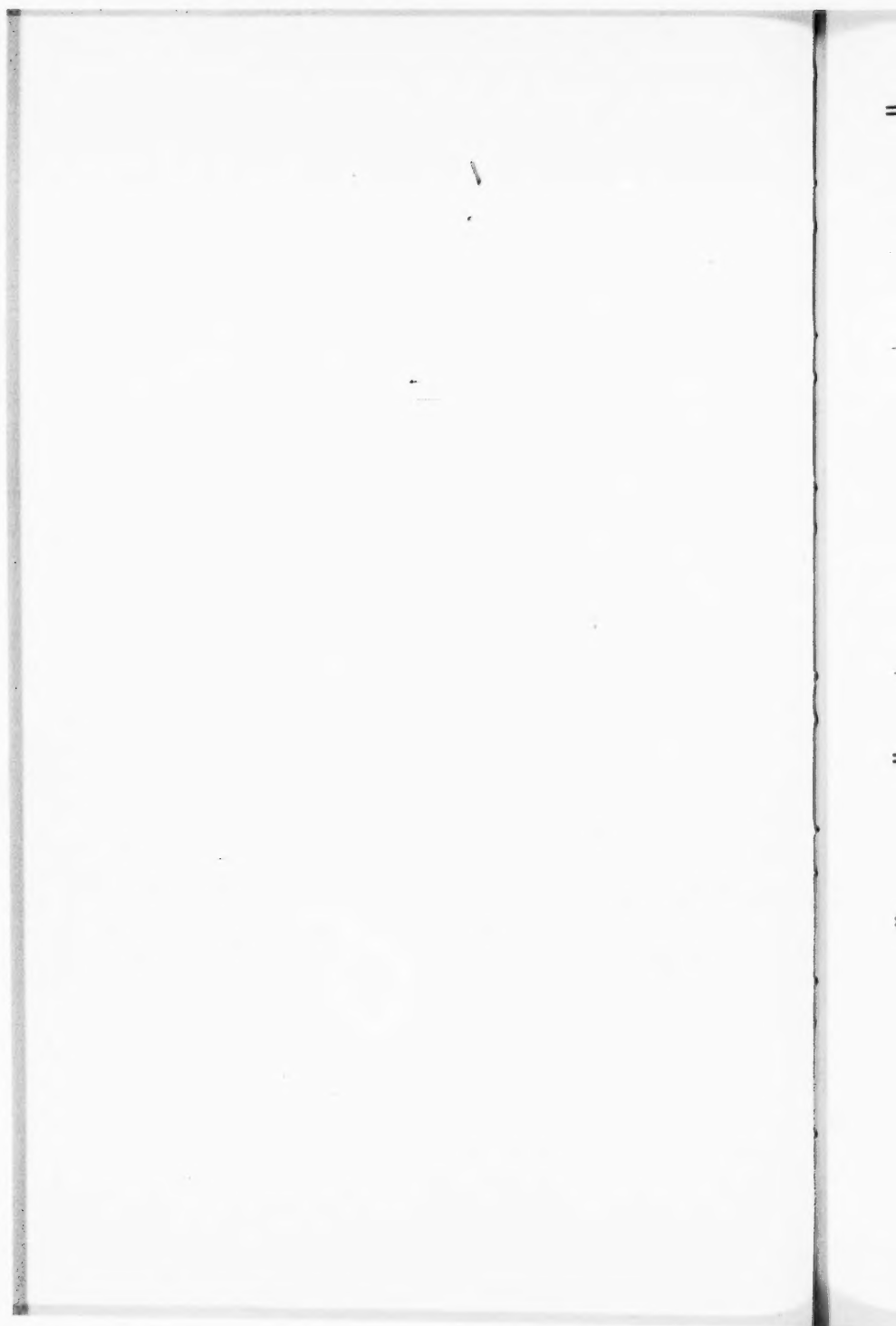
Conclusion.

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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CARL K. RANG

Counsel for Petitioner.

February 26, 1945.



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FEB 26 1945

CHARLES ELMORE GROPLEY
CLERK

Supreme Court of The United States

OCTOBER TERM, 1944

POINT BREEZE EMPLOYEES
ASSOCIATION, INC.,

Petitioner,

v.

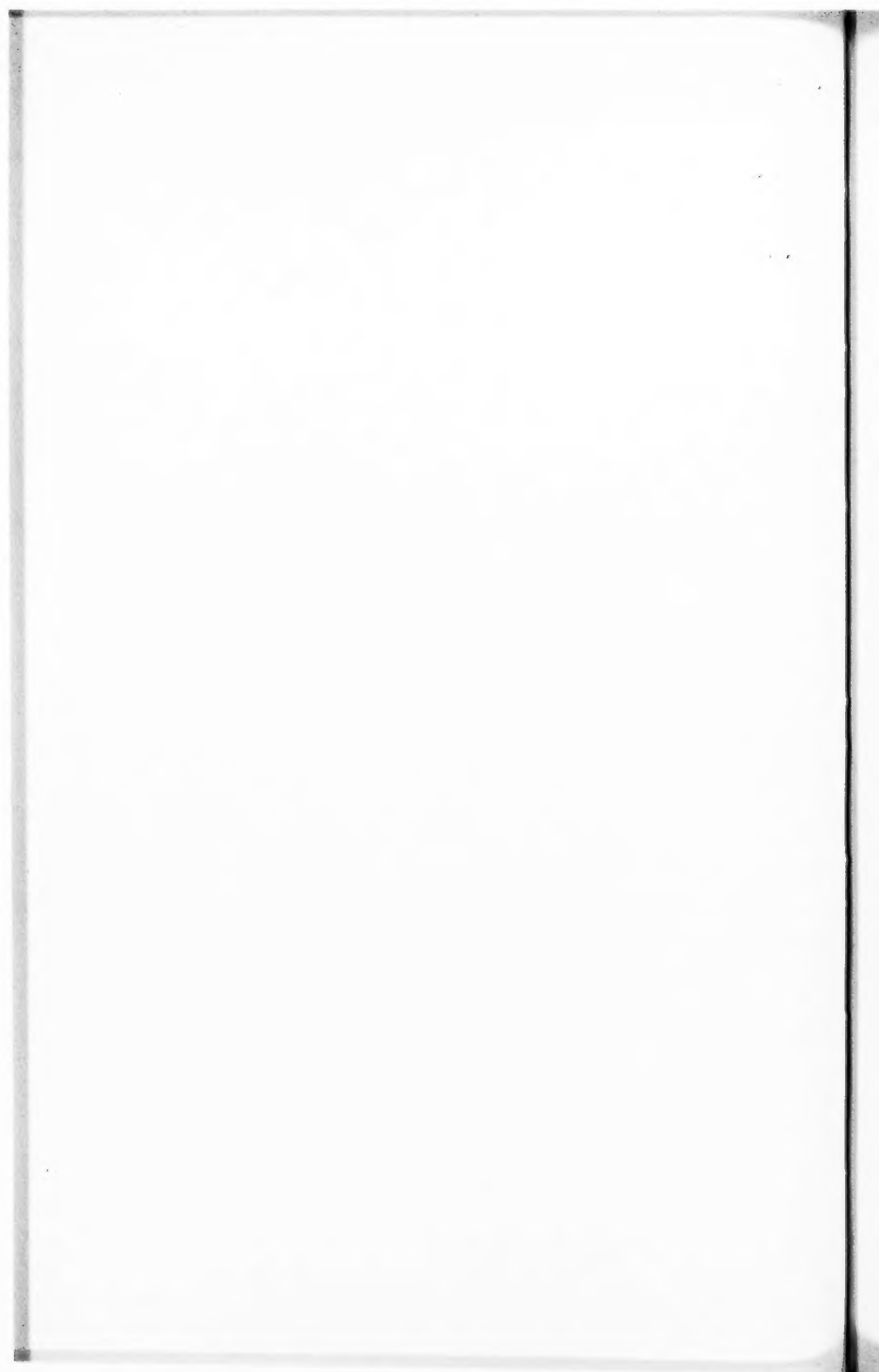
NATIONAL LABOR RELATIONS
BOARD,

Respondent.

No. 988

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of The United States

October Term, 1944

POINT BREEZE EMPLOYEES
ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

*To the Honorable, the Chief Justice of the United
States, and the Associate Justices of the
Supreme Court of the United States:*

Point Breeze Employees Association, Inc. (hereinafter called the "Association"), prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fourth Circuit to review the decree of that Court entered January 3, 1945, in the above entitled cause, denying a petition to review and set aside, and enforcing, an order of the National Labor Relations Board (hereinafter called the "Board"), dated August 9, 1944, under Section 10 of the National Labor Relations Acts, 49 Stat., 449 (hereinafter called the "Act"), directing the Western Electric Company, Incorporated (hereinafter called the "Company") to disestablish this Association and to cease interfering with its employees in the exercise of the rights guaranteed by Section 7 of the Act.

A stay of mandate pending the action of this Honorable Court was issued by the Circuit Court of Appeals on January 27, 1945.

Jurisdiction

The jurisdiction of this Honorable Court is invoked under Section 10(e) of the Act and Section 240(a) of the Judicial Code as amended, 28 U. S. C., Section 347(a).

The Opinions Below

The decision of the Board finding against this Association was rendered August 9, 1944 (R. 64).

The majority opinion of the Circuit Court of Appeals for the Fourth Circuit enforcing the order of the Board on additional grounds rendered January 3, 1945 (R. 323) is not yet officially reported. The minority dissenting opinion of the Circuit Court of Appeals for the Fourth Circuit recommending the setting aside of the order of the Board was rendered January 3, 1945 (R. 332) and is not officially recorded.

Statute Involved

The Statute involved is the National Labor Relations Act, 49 Stat., 449. The Board's order related to alleged violations of Section 8 (1) and (2) of the Act, which read as follows:

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:

Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

Section 7, referred to in Section 8 (1) above, reads as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Statement of Case

This cause involves the majority decree of the Circuit Court of Appeals for the Fourth Circuit enforcing an Order of the Board finding that this Association is dominated by the Company which is thereby violating Section 8 (2) of the Act, and ordering the disestablishment of this Association the bargaining agent for the employees at the Point Breeze, Baltimore, Maryland, plant of the Company.

This Association was organized by the employees in June, 1937, when as a result of the decision of this Honorable Court in the Jones & Laughlin Steel Corporation case (301 U. S. 1) the Company, in April, 1937, terminated the employees' representation plan. The employees desiring someone to represent them and deal with the Company voted to form an independent union. At that time there was no other union wanting or attempting to represent and bargain for these employees.

The Board based its conclusion of present Company domination on the theory that the Association is a suc-

cessor to the Company dominated plan (R. 325), because of three principal things:

(1) That the Company did not give direct notice to each employee of the termination of the plan.

(2) Acts of the employees in organizing in accordance with the advice of their attorney.

(3) That the Company acceded to the demands of its employees, after they were evidenced by a secret vote.

In reaching its conclusion of successorship and Company domination the Board ignored:

(1) The knowledge of all employees of the termination of the plan (R. 74) (R. 326).

(2) That the employees voted on and for every act of the organizing committee after first voting for the committee (R. 76-79-81).

(3) The fact that the Company did not render assistance of any kind to the Association or its organizers.

(4) That the Company under the Act had to accede to the demands of those employees and recognize their duly chosen bargaining agent.

(5) That the War Labor Board had found that the Company and the Association were too antagonistic and recommended that they become more friendly and place more confidence in each other.

The majority opinion of the Circuit Court of Appeals merely follows the decision of the Board and adds thereto other matters that the Board itself did not find or rely upon in making its decision and on the basis thereof sustains the Board and completely ignored the finding and decision of the War Labor Board.

The minority dissenting opinion of Judge Soper, reviews and considers in great detail the facts on which the Board relied and finds that there is no evidence upon which the Board based its finding and Order and that the undisputed evidence ignored by the Board shows definitely that the War Labor Board was right and that the Association is not only not dominated by the Company, but is as a matter of fact independent and aggressive.

The Association alleges that the majority decision of the Circuit Court of Appeals is in conflict with the decision of this Court and of other Circuit Courts of Appeal and involves very important questions regarding the interpretation of the Wagner Act and the rights of labor thereunder and it is imperative that this conflict be definitely settled by this Honorable Court.

Questions Presented

1. Was it error for the Circuit Court of Appeals for the Fourth Circuit to uphold the conclusion of the Board that the Company dominated this Association because the Company's method of notifying the employees of the termination of the plan was found by the Board to be faulty because it lacked some unknown and undetermined formula, when the Board finds as a fact that the termination became a matter of general knowledge among the employees?
2. Was it error for the Circuit Court of Appeals to uphold the conclusion of the Board that the Company dominated this Association because the employees chose by secret ballot certain fellow workmen to form the Association?
3. Was it error for the Circuit Court of Appeals to uphold the conclusion of the Board that the Company

dominated this Association because of acts of the employees in organizing done on the advice of counsel retained by the organizing committee, when there is no evidence or a claim of Company's help or assistance?

4. Was it error for the Circuit Court of Appeals to uphold the conclusion of the Board that the Company dominated this Association by acceding to the demands of its employees to recognize their committee?

5. Was it error for the Circuit Court of Appeals to uphold the decision of the Board that this Company dominated the Association in 1937 because in 1943 a few minor supervisors made personal remarks to a half dozen employees?

6. Was it error for the Circuit Court of Appeals to uphold the conclusion of the Board on grounds not used or relied on by the Board in reaching its decision?

7. Was it error for the Circuit Court of Appeals to ignore the undisputed finding of the War Labor Board, another Governmental agency, that the Association was too aggressive and uphold the contrary conclusion of the Board that the Company dominated this Association, when the question to be decided is present domination?

Specification of Errors

The Circuit Court of Appeals erred in each of the above questions when it sustained the Order of the Board.

Reasons Relied on for Issuance of Writ of Certiorari

1. Error of the Circuit Court of Appeals in holding that the method of notice to the Association was faulty and proved Company domination despite the finding by the Board of proper knowledge by all employees.

On this important question there is a direct conflict between the decisions of the Circuit Courts of Appeal.

The Circuit Court of Appeals for the Seventh Circuit held in *National Labor Relations Board vs. Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594 (C. C. A. 7-1944), that it was "not necessary for the Company to follow any set formal mechanical pattern of procedure in order to evince disestablishment," the Board in the present case found (R. 74) "in general the representatives told the employees that the Respondent would no longer recognize the plan and that the plan was out," or as Judge Soper said (R. 334), "the uncontradicted evidence made it abundantly clear that the plan was out and they could no longer represent the men or bargain with the management, that the men would have to get a new union, or form one of their own, or choose any organization that they preferred, and it is immaterial to the Company what action they might take. This information passed through the body of the employees like wild-fire * * *".

The majority in this cause held that unless notice was given by the Company directly to the individual employees in writing or at a mass meeting, it was ineffective.

There is on this question a conflict between the Circuit Courts which should be determined by this Court as it is a matter of great importance in the administration of the Act.

2. Was it error for the Circuit Court of Appeals to uphold the decision of the Board that the Company dominated the Association because the employees in execution of the right guaranteed them by the Act chose certain former representatives who were fellow workmen to submit a new form of labor organization.

In *Commonwealth Edison vs. Labor Board*, 135 F. 2d (C. C. A. 7-1943), and *Foote Bros. Gear and Machinery Company vs. Labor Board*, 114 F. 2d 611 (C. C. A. 7-1940, remanded for decision on certified record, 311 U. S. 620, and former decision adhered to, 121 F. 2d 802), the Court held that the action of old representatives in forming a new union was not only insignificant, but was natural.

Here again there is a conflict between the Circuit Courts of Appeal on a matter of great importance in the administration of the Act which should be determined by this Court.

3. Error of the Circuit Court of Appeals in upholding the decision of the Board that the Company dominated this Association because of acts of the employees in organizing done on the advice of counsel retained by the organizing committee, when there is no evidence or even claim of Company help or assistance.

This refers principally to portions of the by-laws of this Association which are claimed to be similar to the by-laws of the disestablished employees representation plan.

In *E. I. duPont de Nemours & Company vs. Labor Board*, 116 F. 2d 388 (C. C. A. 4-1940) Cer. den. 313 U. S., 571, the Court held that this was not a basis for an inference of successorship and Company domination. The Circuit Court of Appeals for the Seventh Circuit in *Labor Board vs. Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594 (C. C. A. 7-1944), held that similarities between the constitution of the E. R. P. and the union is not evidence of Company domination and said, "If freedom of uninfluenced action contemplated on the part

of the employees under the Wagner Act is to have meaning, we must recognize their right freely to select the plan of operation under which they desire to act."

Here again we have a conflict between the decision of the Circuit Courts on a matter of great importance in the administration of the Act which should be determined by this Honorable Court.

4. Error of the Circuit Court of Appeals in upholding the decision of the Board that the Company dominated this Association because it acceded to the demands of its employees to recognize its elected committee as bargaining agency.

This right to bargain through representatives of the employees own choice is a fundamental right given employees under the National Labor Relations Act and is set forth in Section 7 as follows:

"Employees shall have the right to self-organization, to form, join or assist labor organization, *to bargain collectively through representatives of their own choosing* * * *." (Italics supplied.)

Various Circuit Courts of Appeal have found that recognition by the Company of the bargaining agent chosen by the employees is no evidence of Company domination when there is no other labor organization attempting to organize.

Cupples vs. Labor Board, 106 F. 2d 100 (C. C. A. 8-1939),

Footte Bros. vs. Labor Board, 114 F. 2d 611 (C. C. A. 7-1940),

Labor Board vs. Hollywood Maxwell Co., 126 F. 2d 815 (C. C. A. 9-1942).

The conclusion of both the Circuit Court of Appeals and the Board that the recognition of the chosen representatives showed Company domination is directly in conflict with the provisions of the Act and the decision of various Circuit Courts of Appeal and is a matter of the greatest importance in the administration of the Act which should be determined by this Court. The result of the finding of the Board and the Circuit Court of Appeals on this issue is to nullify Section 7.

5. Was it error for the Circuit Court of Appeals to uphold the decision of the Board that the Company dominated the Association in 1937 because in 1943 a few minor supervisors made personal remarks to a half dozen of 8,000 employees?

This Court and various Courts of Appeals have decided that the statements of minor supervisors made without the consent or approval of the Company cannot be taken to show Company domination in the absence of disciplinary or discriminatory conduct. The insignificance of these few isolated cases is shown by the fact that the trial examiner before whom the witnesses appeared and testified and who had an opportunity to form an opinion as to their truth and veracity and all the other circumstances surrounding the incidents found no violation of the Act on these grounds.

6. Was it error for the Circuit Court of Appeals to uphold the decision of the Board on grounds not used or relied upon by the Board?

This Court in the case of *Labor Board vs. Virginia Electric Power Company*, 314 U. S. 469 (1941), and in

numerous decisions held that it is the function of the administrative agency to draw conclusions and state the grounds on which they rely and that it is not for the Courts to make finding of facts that the agency itself has not found, or of drawing conclusions from the facts not drawn by the agency. The enforcement by the Circuit Court of Appeals of the Board's order on additional facts not found by the Board is a clear violation of the rule established by this Court.

7. Was it error for the Circuit Court of Appeals to ignore the question of present domination and find domination on alleged happenings in 1937?

This Court in *Labor Board vs. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50 (1943) said, "The Board may appraise the situation and even forbid the appearance of a union on the ballot to select bargaining representatives where in the Board's judgment the evidence does not establish *the union's present freedom from employer control.*" (Italics supplied.) In this case the Board and the Court ignored all evidence of lack of Company domination of this Association, including the finding by the War Labor Board made in a disputed case between this Association and the Company in which the Board, after mentioning the aggressiveness of this union, encouraged this union and the Company to draw closer together for the benefit of all concerned.

The finding of the Fourth Circuit Court of Appeals on this question is therefore in conflict with the decision of this Court on this matter of grave importance in the administration of the Act.

The Circuit Court of Appeals by its finding in this case has done an irreparable injury to this Association and an irreparable injury to all labor by depriving all labor from the benefits given it by Section 7 of the Act. It is necessary for the benefit of labor, this union and its members who are employees of the Point Breeze Plant of Western Electric Company, and who are by this order being denied the free choice of a bargaining agent, that this Court reverse the decision of the Circuit Court of Appeals for the Fourth Circuit so that they may be given the benefits that they are entitled to under the provisions of the Act.

WHEREFORE it is respectfully submitted because of the grave importance of the questions involved in the administration of the Act, and for other reasons set out by this Petition, a Writ of Certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit should be granted.

POINT BREEZE EMPLOYEES
ASSOCIATION,

Petitioner.

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Joint Statement of Dr. Walter Dill Scott

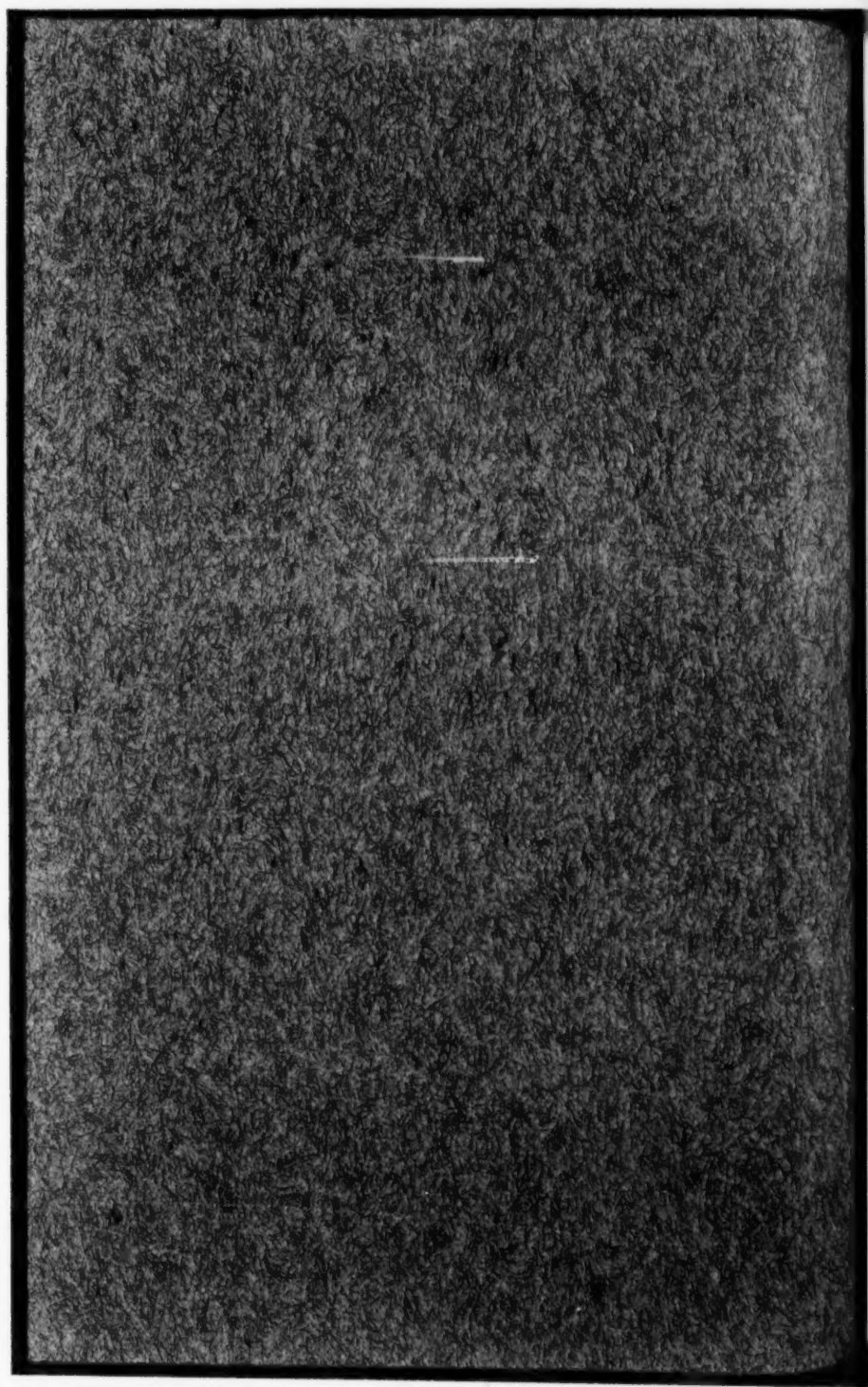
OCTOBER TERM, 1944

WESTINGHOUSE ELECTRIC COMPANY, INCORPORATED
PETITIONER

NATIONAL LABOR RELATIONS BOARD

JOINT STATEMENT OF DR. WALTER DILL SCOTT
PETITIONER

JOINT STATEMENT OF DR. WALTER DILL SCOTT



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In the Supreme Court of the United States

OCTOBER TERM, 1944

Nos. 984, 988

WESTERN ELECTRIC COMPANY, INCORPORATED,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

POINT BREEZE EMPLOYEES ASSOCIATION, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN
OPPOSITION**

OPINION BELOW

The opinions of the court below (R. 323-346) are not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 64-99) are reported in 57 N. L. R. B., No. 178.

(1)

JURISDICTION

The decree of the court below (R. 347) was entered on January 3, 1945. The petitions for writs of certiorari were filed on February 26, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the findings of the National Labor Relations Board, sustained by the court below, that Western Electric Company, Incorporated, dominated, interfered with, and supported a labor organization of its employees (known as Point Breeze Employees' Association), and thereby and in other respects, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

2. Whether the court below erred, upon review of the Board's findings, in referring in its opinion to several items of evidence which support the findings but were not expressly relied upon by the Board in its decision.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, p. 19.

STATEMENT

Upon the usual proceedings, the Board, on August 9, 1944, issued its findings of fact, conclusions of law, and order (R. 64-99). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:¹

In 1933, Western Electric Company, Incorporated (hereinafter called the Company), established a conventional Employee Representation Plan, hereinafter called the Plan, at its several plants (R. 72; 106-109, 112, 131-132, 231-239, 286-287). The Plan operated through three pyramided types of joint employee-management committees, none of which had more than advisory authority (R. 72-73; 231-232, 234-235, 242, 244-245). The employee representatives on the committees were elected by their fellow employees from "voting districts" established under the Plan and the management representatives were appointed by the Company's officials from the highest level of the supervisory staff (R. 72-73; 133-134, 232, 233, 239, 243). Membership in the Plan was limited to hourly rated workers and was automatic (R. 72; 117, 232-233, 239, 242). No dues were required, as the Company financed the

¹ In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence. Occasional references to the original transcript of the record are designated "Tr."; all other references are to the printed record and are designated "R."

entire operation of the Plan (R. 73; 114-118, 133, 147, 231, 244). At the Company's Point Breeze, Maryland, Works, which is the only plant here involved, the Plan was maintained in operation and supported by the Company without material alteration until April 1937, when this Court sustained the constitutionality of the Act (R. 73; 110-118, 132-133, 231-246, Bd. Exh. 6.).

The Point Breeze Employees' Association (hereinafter called the Association) was formed in the period between April and June 1937 under the sponsorship of the 17 employee representatives under the Plan, for the avowed purpose of continuing the Plan system of conducting labor relations and of preventing any "outside" organization from coming into the plant (R. 75-82, 90-92; 120-125, 127-128, 154-155, 202, 203, 206-207, 211, 212, 218, 247-252, 254-257). These representatives also drafted its constitution and by-laws, the major portions of which are still in effect (R. 79, 91; 124-125, 130-131, 148-149, 256-257, Bd. Exh. 41, Intervenor's Exh. 14). The structure of the Association retained the essential features of the Plan (R. 81; compare R. 255-266 with R. 231-246), including the latter's division of the plant into "voting districts" (R. 81-82; 239, 261-264), its requirement that representatives must be employed in the voting district which they were to represent (R. 82, 92-93; 189-190, 259, 289), its restriction of eligibility to hourly rated workers (R. 75, 80; 117, 239, 258), and its

allocation to the general membership of a role limited almost exclusively to voting in the annual elections (R. 82, 92; 231-235, 242-245, 260-261, 266; see also R. 113, 134, 163, 177, 223, 226-227).

The formation of the Association was not preceded by any effective steps by the Company to free the employees from the confining effects of its domination of the Plan (R. 94). There was no explicit disavowal of the Plan to the employees or clear and unequivocal announcement to them that the Company would no longer deal with it and that it would thenceforth be indifferent to the employees' organizational efforts (R. 90). Instead, the Company's vice president, on April 16, 1937, merely informed the employee representatives under the Plan, but not the employees generally, that the Company could no longer bargain with that organization, and thereafter permitted the representatives to transmit this information second-hand to the general body of employees and to tell them that the Plan was "out" solely because it had been financed by the employer and that it was necessary to have a "new" and "self-supporting" Plan or to have no organization at all (R. 74-75, 90; 119, 122-123, 127-128, 130, 136, 148, 152, 154-155, 160-161, 175, 199-200, 206, 208, 211-212, 217, 218, 247-252).

Nor was there any break in time between the Plan and the Association, during which the employees might exercise a free choice as to representation; instead, complete continuity was main-

tained (R. 90-91). Thus, despite the Company's earlier declaration to the representatives that it would no longer "deal" with the Plan, it continued until April 22 to meet with the Plan representatives for the purpose of discussing, in the manner customary at such conferences, wages, hours, and conditions of work (R. 75, 90-91; 135, 201-202, 281-284, Bd. Exhs. 30, 31). On April 22 and 23, the 17 Plan representatives conducted at their own expense and "won" an election in which they ran themselves as the only candidates for membership on a committee to act as the employees' bargaining agency until the "new" Plan was formed (R. 76-79, 90-91; 121-122, 149, 248-252). The Company thereupon promptly recognized the continuing exclusive representative status of the 17 representatives during the subsequent period of 60 days while they formed the Association (R. 79, 91; 252-253, 256).

The 17 Plan representatives submitted the Association to the employee body for adoption at an election on June 12 and 14, 1937 (R. 79; 124-125, 128, 267-268). In the same balloting the employees applied for membership in the Association, authorized a check-off of dues, and selected representatives to serve on the Association's governing board (R. 79-81, 93; 125, 128, 267). The employees accepted the Association, and elected 13 of the 17 Plan representatives to continue on the board of 24 representatives under the Association (R. 81, 93-94; 128-129, 213, 217, 256, 268,

276).² The employees' acceptance of the Association, under the foregoing circumstances, was not their free and voluntary act (R. 94); restricted and conditioned over a long period of time to being represented by the dominated Plan, the employees, all of whom had been automatically members of that organization, "were moved as a mass" into the Association without ever being freed from the compulsive effects of the Company's domination of the predecessor organization (R. 93).

Shortly after the foregoing events, the Company granted the Association exclusive recognition (R. 83; 268-270), and subsequently afforded it still other support. Thus, the Company agreed to the initial major demands of the Association for a check-off system and for a general wage increase when its leaders warned that unless the concessions were granted the employees would not "want this kind of organization" and might affiliate with "other organizations" (R. 83-84; 137-138, 270-271, 273-275, Resp. Exh. 30). The Company's supervisory employees often permitted Association members to take time off to solicit members in the plant during the working day (R. 86-87; 151,

² Under the Association there were 24 representatives instead of 17 as under the Plan (R. 81-82; 256, 262-264). The first president of the Association was the last president of the Plan and chairman of the committee which drafted the successor's constitution and bylaws (R. 83, 92; 113, 130, 256).

164-165, 171-172, 174-175, 180-183, 184, 190-192, 197-198, 226, 229-230. See also Tr. 507-513, 625), and to engage in widespread distribution of the Association's publication to employees at their places of work (R. 87; 163-167, 173-174, 183-186, 224-225, 228-229). In 1941 and 1942 the Company also allowed the Association to hold elections on company time and premises (R. 86; 155-156, 161-162, 169-170).

Moreover, when, in January or February 1943, the International Association of Machinists, herein called the I. A. M., began to obtain members among the Company's employees (R. 86; 17-18), the Company's supervisors (R. 88; 106) attempted to forestall the threat to the Association's status and to discourage the employees from affiliating with the I. A. M. Thus, one employee, who admitted her I. A. M. membership in response to the questioning of a supervisor, was warned by him to "stay the hell away from his girls" on penalty of discharge (R. 88-89; 186-187, 195-197). Another employee, who disclosed his I. A. M. affiliation to a group chief, was told by the chief that the employees "would lose their sick disability, holiday pay," and other benefits if an "outside union" came into the plant (R. 87-88; 176-177, 178). Supervisory employees also defended the Association's bargaining power to employees, described "outside" labor unions as "dishonest" organizations, unable to obtain employment for their members when

"working conditions are bad," and labeled the joining of an "outside" union as "the greatest crime a man can commit" (R. 88-89; 156-157, 172-173, 192-193). And I. A. M. members were denied privileges in the conduct of I. A. M. business during working hours which Association members were permitted to exercise in the conduct of Association business (*supra*, pp. 7-8) (R. 87, 94; 188-189).

The Board concluded (R. 90-95, 96, 97) that the Company had dominated, interfered with, and supported the Association, in violation of Section 8 (2) of the Act, that it had engaged in interference, restraint, and coercion, in violation of Section 8 (1), and that these unlawful practices and their effects were continuing. It ordered the Company to cease and desist from the unfair labor practices, to withdraw recognition from and disestablish the Association as collective bargaining representative of its employees, and to post the usual notices (R. 96, 97-99).

Thereafter, the Company and the Association filed separate petitions in the court below to review and set aside the Board's order (R. 308-316, 350-356). The Board answered, requesting enforcement of its order against the Company (R. 317-321, 356-358). On January 3, 1945, the court handed down its opinion (R. 323-332) and entered its decree (R. 347) enforcing the Board's order in full. Judge Soper dissented (R. 332-346, 347).

ARGUMENT

1. Petitioners have presented the case as if the validity of the Board's ultimate findings as to the unfair labor practices were to be determined by an examination of each of their underlying elements separately and in isolation. By this approach and by relying upon certain erroneous assumptions which are at variance with well supported findings of the Board, upheld by the court below, they have sought to represent the case as presenting novel, undecided questions, and as conflicting with the decisions of this Court and of other circuit courts of appeals. Petitioners' arguments are fallacious, however, because they rest on fundamental misconstructions of the record and because it is well settled that in determining the validity of Board findings the entire congeries of relevant facts must be considered, "not in isolation but as part of a pattern of events." *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, 539.³ When the case is properly viewed, the decision of the court below is clearly correct, as the evidence summarized in the Statement (*supra*, pp. 3-9) shows. Moreover, the alleged conflicts between it and the cases cited by petitioners are revealed as present-

³ See also *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 588; *National Labor Relations Board v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50, 57-58; *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 79.

ing merely factual differences which do not affect the basic principles of the decision.

2. Petitioners contend (Co. Pet. 4, 5, 7, 14-18; Ass'n Pet. 4, 6, 10-11) that the court below erroneously sustained the order of the Board "on grounds not relied on by the Board, including facts not even found by the Board to have occurred" (Co. Pet. 14). A reading of the entire opinion of the court below shows, however, that in approving the Board's findings as to the unfair labor practices, the court in fact relied almost entirely upon the same elements and applied the same principles as did the Board. While the court adverted in the course of its opinion to three minor items of evidence supporting the Board's findings (R. 326-327, 330), which the Board failed to mention in its decision,⁴ this was

⁴ These items were the testimony of employee Mileski—whose testimony in other respects the Board found to be credible (R. 86, 88)—respecting a conversation with Plan representative Myers (incorrectly referred to in the court's opinion as Plan representative Schmidt), at about the time the Association was being formed in 1937 (R. 326; see R. 154-155); Mileski's further testimony respecting a conversation with supervisor Leichsenring in 1939 (R. 330; see R. 156-157); and the testimony of employee Ohrin to the effect that employees were signed up by the Association on company time with the knowledge of supervisor Mercer (R. 330; see R. 174-175). The Company also complains (Co. Pet. 15-16) that the court referred in its opinion to "(5) An obvious belief by the employees that the Company desired an independent, rather than an outside, union"; and "(6) Swift grant to the Association by the Company of a check-off of dues, wage increases and other favors" (R. 331). The Company asserts

not error. Evidence which the Board has not recited in its decision is not necessarily excluded from consideration upon judicial review of its findings. *Stewart Die Casting Corp. v. National Labor Relations Board*, 114 F. (2d) 849, 854 (C. C. A. 7), certiorari denied, 312 U. S. 680; *North Carolina Finishing Co. v. National Labor Relations Board*, 133 F. (2d) 714, 717 (C. C. A. 4), certiorari denied, 320 U. S. 738.⁵

Moreover, whether or not the language of the opinion is wholly acceptable, the court's decision

that the Board made no statement anywhere in its decision as to the employees' beliefs respecting its preferences among unions, and that, although the Board referred to the check-off and wage increases, they "are not relied upon by the Board as significant matters * * *" (Co. Pet. 15). Neither assertion accurately reflects the Board's findings. The Board expressly found (R. 95) that the Association "stands in the same position as the Plan," which the Company had fostered, dominated, and supported, and that the employees had never been effectively released from the restraints upon their freedom of organization which its maintenance of the Plan had engendered (R. 94). And the Board found (R. 83-84) that the Company granted the check-off of dues and the wage increases after the Association's representatives warned that if the concessions were not granted the organization might "disband and fall in hands of other labor organizations," that the employees would "attempt to secure more wages through other organizations," and that they "wouldn't want this kind of organization without 10 percent increase."

⁵ In *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 296, this Court, in sustaining the Board's finding that the schedule of the "S. S. Fairland" had been altered by the company with knowledge that the crew had

is correct, for the Board's findings are clearly adequate to support its conclusions as to the unfair labor practices,⁶ and, as has been stated, these findings are amply supported by substantial evidence. A correct decision will not be disturbed merely because "the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U. S. 238, 245; cf. *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 88; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 195-197.

3. Petitioners also assert (Co. Pet. 19, see also 5, 7-8, 18-23; Ass'n Pet. 6, 11) that "the Board has declined to commit itself on the crucial question of present actual domination or independence" of the Association and that the Board's decision is in conflict in this respect with the decision of this Court in the *Southern Bell Telephone* case

shifted their union affiliation, stated that "The 'Fairland' is equipped with radio" (at p. 271). This fact had not been mentioned in the Board's decision, but it was plainly relevant to the question whether the Board's finding of knowledge had the requisite evidentiary support. Such instances are of frequent occurrence under the Act. See, e. g., *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584.

⁶ Accordingly, there is no conflict, as petitioners contend (Co. Pet. 7, 16-17; Ass'n Pet. 10-11), with *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469; *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80; *Florida v. United States*, 282 U. S. 194; *Texas and Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197; and "other decisions of this Court" (Co. Pet. 16).

(319 U. S. 50).⁷ But the Board expressly found that the Company's acts of domination and interference with the formation and administration of the Association "render the Association incapable of serving the * * * employees as a genuine collective bargaining representative and render its continued recognition * * * an obstacle to collective bargaining through freely chosen representatives" (R. 96); and that the Company was still dominating and interfering with the administration of the organization (R. 95). These findings are, if anything, more complete than were those made by the Board in the *Southern Bell* case.⁸ In that case this Court stated (319 U. S.

⁷ Petitioners' further assertions (Co. Pet. 3-4, 7-8, 18-23; Ass'n Pet. 4, 6, 11) that the Board failed in its decision to "review and appraise" their "very substantial evidence," including a report of a panel of the National War Labor Board and evidence of benefits obtained for the employees, that the Association is aggressive and militant, is incorrect. The Board's decision contains a full discussion of the Association's bargaining activities, including proceedings before the War Labor Board (R. 84-85, and note 23). It is well settled that the Board was not required to give such evidence conclusive weight on the issue of domination. See the *Southern Bell Telephone* case; *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, 544; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 600.

⁸ In the *Southern Bell* case the Board found only that the employer's continued recognition of the organization constituted an obstacle to free collective bargaining (35 N. L. R. B. 621, 640). In that case this Court accepted the Board's view that this finding expressed the Board's judgment that, despite the passage of time and changes, the policies of the Act would be effectuated only by disestablishment.

50, 60) that "the question of the weight to be given the passage of time or subsequent efforts to dissipate the effect of this early domination is for the Board." The court below applied the same principle in this case (R. 331).

4. Contrary to petitioners' further contentions (Co. Pet. 5, 8-9, 23-29; Ass'n Pet. 5, 6-7), the instant case does not involve a holding by the Board and the court below that a "formal mechanical pattern" of notice to the employees of dissolution of the Plan was necessary in order to reestablish their freedom to organize for collective bargaining. The Board's decision discloses on its face that its conclusion (R. 94) that "the employees * * * were not freed from the [Company's] domination of the Plan, and that their acceptance of the Association * * * was not their free and voluntary Act" rests, not upon any ritualistic requirements, but upon the equivocal nature of the Company's notice of disestablishment of the Plan and the whole series of events surrounding the formation of the successor organization (R. 90-94). Likewise, the court below held (R. 326) that "No particular form of notice is required under the Act * * *," but based its concurrence with the Board's conclusions upon the "whole congeries of facts," among which the "equivocal second-hand announcement as to the dissolution of the Plan" was one (R. 326, 331). Accordingly, there is no conflict in principle with

National Labor Relations Board v. Duncan Foundry & Machine Works, Inc., 142 F. (2d) 594 (C. C. A. 7); that case turned, as does the instant case, upon its own particular facts. Cf. *Westinghouse Electric & Mfg. Co. v. National Labor Relations Board*, 312 U. S. 660, affirming (*per curiam*) 112 F. (2d) 657 (C. C. A. 2).

5. Petitioners' further contentions (Co. Pet. 3, 6, 9, 10, 29-30, 31-32; Ass'n Pet. 4, 5-6, 7-10) that the Company "did not participate [in] or advise or assist" (Co. Pet. 30) the activities of the employees in organizing the Association and that the Board, in reaching its conclusion as to domination and interference with the Association, therefore improperly relied upon the actions of the employee representatives under the Plan, and upon the Company's recognition of the committee comprising these representatives, selected by the majority of the employees as an interim labor organization, are likewise without merit. They disregard the Board's well supported findings (R. 91, 93-94), concurred in by the court below (R. 329), that the employees were never freed from the coercive effects of the Company's prior domination of the Plan and that, in the language of the court below (*ibid.*), "these Plan representatives were unable to emancipate themselves from the domination of the Company so as to represent the employees fairly. Cf., *National Labor Relations Board v. Falk Corp.*, 308 U. S. 453, 461."

See also the *Westinghouse* case, *supra*. Petitioners' claims of conflicts in respect to these features of the case with the decisions of other circuit courts of appeals (Co. Pet. 9, 10, 30, 31; Ass'n Pet. 8-10), are thus unfounded. See, also, pp. 15-16, *supra*.

6. Finally, petitioners say (Co. Pet. 4, 6, 10-11, 32-35; Ass'n Pet. 6, 10) that the Board, in reaching its conclusions as to the unfair labor practices, improperly relied upon allegedly minor and isolated incidents of support of the Association by several supervisory employees. These included activities of supervisors in questioning employees as to their membership in the I. A. M., and statements by them lauding the Association, disparaging "outside" unions, and warning employees not to join such unions on pain of losing sick disability, holiday pay, and other benefits (R. 87-90, 94). These incidents were correctly regarded by the Board as "part of the circumstances from which the Board is to draw conclusions." The *Southern Bell* case, 319 U. S. at 57-58. They are not protected by the First Amendment merely because they involve "pressure exerted vocally." The *Virginia Electric & Power Co.* case, 314 U. S. at p. 477. Cf. *Thomas v. Collins*, No. 14, this Term, decided January 8, 1945. Nor was it necessary for the Board to show that the pressure bore fruit. *National Labor Re-*

lations Board v. Link-Belt Co., 311 U. S. 584, 588.⁹
The cases cited by the Company (Co. Pet. 33-34)
are not in conflict with these principles.

CONCLUSION

The decree of the court below is correct and
presents neither a conflict of decisions nor any
question of general importance. The petitions
for writs of certiorari should therefore be denied.

Respectfully submitted.

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MARCH 1945.

⁹ The Company also objects to the Board's findings as to these incidents on the ground that the trial examiner rejected them (R. 59) and the I. A. M. filed no exceptions to the examiner's finding (Co. Pet. 32-33). But it is the Board, not the examiner, that is charged under the Act with making the findings. Section 10 (c). And the Board's Rules and Regulations provide (Article II, Section 33) that the "failure to file a statement of exceptions [to the Intermediate Report of the Trial Examiner] shall operate as a submission of the case to the Board on the record."



APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * *
SEC. 10. * * *

* * *
(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(19)



(4)
MAR 28 1945

CHARLES ELMORE DROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1944.

No. 984.

WESTERN ELECTRIC COMPANY, INCORPORATED,
Petitioner,
against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION OF WESTERN
ELECTRIC COMPANY, INCORPORATED,
FOR A WRIT OF CERTIORARI.

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This short reply brief is directed solely to certain distortions of fact in the brief of counsel for the National Labor Relations Board submitted in opposition to our petition for certiorari, and to the attempts of counsel for the Board to evade the showing made in our petition and main brief that the case involves six important questions in the administration of the National Labor Relations Act and federal administrative law and clear conflicts on such questions between the decision of the majority of the court below and decisions of this Court and of other Circuit Courts of Appeals.

I. Distortions of Fact.

(a) The brief of counsel for the Board makes no mention of the pivotal finding of the Board itself (R., 74) that the Company's announcement of the termination of the employee representation plan became a matter of general

knowledge among the employees. Only through this glaring omission are counsel able to take the disingenuous position that there is no conflict between this case and *Labor Board v. Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594 (C. C. A. 7, 1944).

(b) Counsel state (Br. 4) that the Union was formed "for the avowed purpose of continuing the Plan system of conducting labor relations." There is not a line of testimony regarding any such "avowed purpose", and neither the Board nor the Court below so found.

(c) Counsel state (Br. 4) that "the structure of the Association retained the essential features of the Plan." But the Board itself found (R. 82-83) that the two principal features of the Plan, i.e., joint committees and Company financial support, were not present in the structure of the Union.

(d) Counsel state (Br. 4) that the Union's structure contained a "requirement that representatives must be employed in the voting district which they were to represent." But the evidence is uncontradicted that there was no such provision in the constitution or by-laws of the Union upon its organization in 1937, and that such a provision was inserted for the first time in 1942 and later rescinded, as Judge Soper in his dissent points out (R. 338).

(e) The repeated statements (Br. 5, 7, 8, 9) to the effect that the Company "permitted" employees to take certain actions is misleading and incorrect. The normal construction to be placed upon these words would indicate that the Company had some option and that it chose to allow these acts to take place. In fact, in most of such alleged instances, the Company was not aware of such actions until they had taken place. In any event, it could not legally have policed the activities of its employees or prevented them from doing the acts in question.

(f) The entire approach of counsel for the Board is on the theory of an *a priori* assumption of domination of the employees by the Company. However, the undisputed testimony is that no employee voted for the Union because he thought the Company wanted him to do so (Typewritten testimony, p. 147).

The distortions just mentioned cannot obscure the uncontradicted evidence that the Company announced the termination of the employee representation plan and its indifference to organizational activities of the employees, that this announcement was passed on to the employees by the former employee representatives under the plan and became a matter of general knowledge among the employees, that an organizing committee elected by the employees by secret ballot drafted the constitution and by-laws of the Union without any advice, assistance or interference by the Company, that the Union was subsequently selected by the employees as their bargaining agent by an overwhelming secret vote, and that the Union is in fact independent of, and aggressive towards, the Company.

II. Evasion of the Issues.

We proceed to mention briefly the principal respects in which the brief of counsel for the Board fails to meet the reasons advanced in our petition and main brief for the allowance of the writ.

(1) The conflicts between the decision in this case and the decisions of other Circuit Courts of Appeals.

(a) The plain conflict between the decision in this case and the decision in the Seventh Circuit in the *Duncan Foundry* case as to the sufficiency of the Company's announcement cannot be conjured away by the statement (Br. 16) that each of the cases turns "upon its own particular facts." Actually the "particular facts" regarding the method of giving notice in the instant case are identical with those of the *Duncan Foundry* case and, as we have

shown in detail in our petition and main brief (pp. 8-9, 23-29), were held in that case to be sufficient. The only difference is that in the case at bar the Board itself made a specific finding that the Company's announcement became a matter of general knowledge among the employees (R., 74), a finding which it had not made in the *Duncan Foundry* case.

To say, as counsel for the Board say here, that knowledge actually obtained by the employees is insufficient because it was not obtained in a particular manner is definitely to sacrifice substance to form and to require the use of some "formal mechanical pattern."

(b) Counsel for the Board make no attempt to deny that, as our petition and main brief showed (pp. 9, 29-30), the decision of the majority in the court below is in conflict with at least six decisions in the Seventh and Fifth Circuits, in that the majority below endorsed reliance by the Board, as evidence of domination, on organizational activities of the employees themselves, as to which it is not claimed that the Company advised, assisted or interfered. Counsel's mere evasive reference (Br. 16) to their contention that the employees "were never freed from the coercive effects of the Company's prior domination of the Plan" is ineffectual as a means of turning aside these decisions, since it assumes the very point to be proved.

The contention of counsel also seems to be that the Company was required to police and interfere with the organizational activities of the employees, a position contrary to express provisions of the Act, and in support of which, obviously, no authority is cited.

(c) Similarly, counsel for the Board make no attempt to deny that, as shown in our petition and main brief (pp. 10, 31-2), the decision below is in conflict with decisions in the Ninth, Eighth and Seventh Circuits in that the majority of the court below endorsed reliance by the Board, as evidence of domination, on the fact of performance by the Company of its legal duty under the Act of recognizing a

committee elected by the majority of the employees as their bargaining agent. Nor do counsel discuss or distinguish the decisions cited in our main brief (p. 31) on this point.

(d) Also, counsel for the Board in no way indicate how the force of the decisions in the Second, Third and Fifth Circuits cited in our main brief (pp. 33-4) can be turned aside in such a way as to eliminate the clear conflict between them and the decision in this case on the issue of the propriety of the Board's reliance on alleged incidents involving only seven non-supervisory employees out of over 5,000 and only six supervisory employees, at the lowest levels, out of over 400, particularly when, so far as such incidents involved expressions of views, they are protected by the constitutional guaranty of freedom of speech.

It is no justification of these evasions to say, as counsel for the Board do (Br. 10-11), that the Board decided this case upon an aggregate of facts. Mere aggregation of facts upon which the Board could not legally rely cannot properly constitute a basis of administrative action. We submit also that where the Board and the court below have relied upon an aggregation of facts, the demonstration of the legal invalidity of any item invalidates the ultimate conclusion; *a fortiori*, where a substantial number of the most important items have been shown to be without legal significance.

(2) Reliance by the court below on grounds not relied on by the Board, including facts not even found by the Board to have occurred.

In their argument (Br., 11-13), counsel for the Board attempt to answer our point regarding this important matter of administrative law (a) by minimizing the matters relied on by the majority below in their opinion, which were not relied on by the Board, and (b) by taking the untenable position that the same rule is applicable to the review of decisions of administrative bodies as is applicable to review of decisions of a lower court, namely, that

the decision of an administrative body may be supported on grounds not relied on by the administrative body itself.

(a) We do not believe that counsel for the Board will succeed in minimizing these matters in the eyes of this Court in view of the emphasis upon them in the opinion of the majority below. Two of the matters (*i. e.*, the asserted belief of the employees that the Company desired an independent union and the alleged swift grant of a check-off, wage increase, etc.) were among the seven important points stressed by the majority of the court below in their summary of the facts which they thought support the Board's conclusion (R. 331)*. A third (the non-existent conversation between employee Mileski and plan representative Schmidt) was used by the majority of the Court below as the basis (R. 326) for their crucial conclusion (R. 331) that the Company's announcement of termination of the plan and indifference to organization activities of employees was second-hand and equivocal.

The majority below, in supporting the conclusion of the Board, also laid stress (R. 330) on two additional matters not found by the Board to have occurred, namely, the alleged incidents involving Leichsenring and Mercer (Our main brief, 16). These matters had been ruled out by the Trial Examiner as not supported by any "substantial credible evidence" (R. 59), and the Board had concurred.

(b) In *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 88 (1943), this Court clearly laid down the rule that in the review of the action of administrative agencies, the action of the agency will not be sustained unless the grounds upon which the agency acted are clearly disclosed and adequately sustained by its own findings. In so holding, this Court expressly pointed out that the rule so applied is different from that which obtains

* Counsel imply (Br. 11-2 *fn*) that the Board made findings on these matters. A glance at the "findings" to which counsel refer will show that they in nowise controvert the points made in our main brief (pp. 15-6).

in the review of the decisions of judicial tribunals, where the decision of the lower court will be affirmed if the result is correct although reached upon a wrong ground or for a wrong reason. For the rule applicable to the review of judicial tribunals this Court cited *Helvering v. Gowran*, 302 U. S. 238, 245 (1937), which is relied on here by counsel for the Board (Br. 13), and expressly distinguished that decision.

The principle applicable to the review of the action of administrative agencies set forth in the *Chenery Corporation* case has been uniformly applied by this Court to the actions of other administrative agencies generally, including the Board (*Labor Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 478-80 [1941]; *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 195-7 [1941]). Counsel for the Board give no reason why that principle is not applicable to the present case. If and to the extent that the two circuit court of appeals cases cited by counsel for the Board (Br. 12) conflict with such principle, these decisions were erroneous and constitute no precedent in this Court.

(3) Failure by the Board to review and appraise substantial undisputed evidence that the Union is independent and militant and not dominated by the Company.

In our petition and main brief (pp. 7-8, 18-23) we showed that the Board failed to review and appraise substantial undisputed evidence, including the report of a panel of the War Labor Board, that the Union was independent and aggressive and not dominated by the Company, although required to do so under the principles enunciated by this Court in *Labor Board v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50 (1943), and in other cited decisions of this Court.

Counsel for the Board state (Br., p. 14) that the findings in the present case were in this respect more complete than those made by the Board in the *Southern Bell* case and that this Court accepted such lesser finding

of the Board in that case. This statement by counsel is simply incorrect. An examination of the Board's report in the *Southern Bell* case shows that in the "Concluding Findings" (35 NLRB 637-40, at pp. 638-9) the Board reviewed the evidence introduced on this point in that case and expressly found that such evidence did not overcome the original and continued active domination of the organization there involved. There is no corresponding review and appraisal to be found in the Board's report in this case. The so-called "findings" referred to by counsel for the Board (Br., p. 14) as satisfying the requirements of the *Southern Bell* decision are not findings at all but conclusions of law based entirely upon events of 1937, as we showed in our main brief (pp. 19-23).

Counsel for the Board do not claim in their argument (Br. 13-15, and footnotes) that there was any evidence of actual present domination. They state that the Company's contention that the Board failed to review and appraise the very substantial evidence of present independence is incorrect and that the Board's decision "contains a full discussion of the Association's bargaining activities, including proceedings before the War Labor Board (R. 84-85, and note 23)". In fact, the Board's decision does not contain an appraisal of these two matters. Nor does it as much as mention the other substantial undisputed evidence of independence of the Union, including (1) the report of the panel of the War Labor Board showing the Union to be independent and militant (classed by Judge Soper [R. 342-3] as the clearest evidence of complete independence of the Union), (2) evidence regarding the radical changes in the personnel at the plant and in the membership of the Union over the six-year period involved, and (3) evidence regarding the sturdy nature of the organization of the Union at the time of the hearing.

Conclusion.

It is plain that there are serious conflicts between the present decision and the decisions of this Court and of other Circuit Courts of Appeals on matters of great importance in the administration of the Act and federal administrative law.

The petition of the Company for a writ of certiorari should accordingly be granted.

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